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A

TREATISE

ON

THE LAW

OF

DISTRESSES.

BY JAMES BRADBY,
OF LINCOLN'S INN.

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TO

SETH THOMPSON, ESQ.

THIS WORK IS,

WITH SENTIMENTS OF ESTEEM

AND GRATITUDE FOR HIS

PROFESSIONAL INSTRUCTIONS,

RESPECTFULLY INSCRIBED,

BY HIS OBLIGED FRIEND

AND OBEDIENT SERVANT,

THE AUTHOR.

PREFACE.

IT has been my design in the following work, to present to the reader, a concise but systematic treatise on the Law of Distresses; confining my inquiries to such things as were originally the subjects of a Distress (properly so called) at the common law. On this account, I have omitted the consideration of those Distresses which arise wholly out of the provisions of particular statutes; such as Distresses for poor's rates, or under the authority and directions of canal, or inclosure acts; for which we must have recourse to the particular statutes themselves authorizing these Distresses, or, as they may in general be called, statutory executions. For a simi-

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A

TREATISE

ON THE

Law of Distresses.

CHAPTER I.

Of the Origin, Progress, and Nature of the Law of Distresses.

A DISTRESS is the taking of a personal chattel, without legal process, from the possession of a wrong doer, into the hands of the party grieved; as a pledge, for the redress of an injury, the performance of a duty, or the satisfaction of a demand. This remedy appears to be so ancient in the laws of England, that it is probably coeval with the common law itself; or may rather be considered, as one of those principles which collectively constitute that system which we denominate the common law. The antiquity of the doctrine of

Definition of a Distress.

CHAP. I. Distress renders its origin obscure; for it is not easy to trace the rise and progress of those usages which obtained among a rude and unlettered people, who entrusted the preservation of their laws to a vague and uncertain tradition. But, whatever may have been the period at which the remedy of distress was adopted by the English law, it seems evidently to have been posterior to that time, in which the feudal system prevailed in its fullest rigour; for as a very learned writer on this subject, the Lord Chief Baron Gilbert, has observed, the non-performance of any of those services for which originally a distress was made, was by the feudal system an absolute forfeiture of the feud; the rigour of which law was afterwards mitigated, and these forfeitures changed into Distresses. (*a*) It is the opinion of the same learned writer, that this change was adopted from the pignorary method of the civil law; by which, the creditor was in some cases allowed to sell a part of the pledges which he held as a security for his debt. (*b*) But there seems to be a material difference between the Roman and English laws in this respect: for in the former, both the pignus and hypotheca were pledges delivered by the debtor, or taken by the creditor, in consequence of a particular stipulation; (*c*) whereas the remedy of Distress by

(*a*) Gilb. on Distresses, &c. by Hunt. p. 2. and Sullivan, Lect. 6th.

(*b*) Gilb. ut supra.

(*c*) Vide Digest. Lib 20. Tit. 5. De Distractione Pignorum et Hypothecarum. passim. Thus Calvin says, Pignoris,

the English law, was always a right of taking out of the hands of another, *without his consent*, a pledge, or security, for the satisfaction of a demand. There does not therefore appear to be much analogy between the principles of the Roman and English laws in this respect; nor does it seem probable, that the remedy of distress in the latter, is derived from the doctrine of pledges in the former, any further than as the mild and equitable principles of the civil law contributed in this, as in many other respects, to correct the injustice, and soften the rigour of the military systems of modern Europe.

Whatever may have been the origin of the Law of Distress, with relation to the Roman code, it seems to have prevailed among the Gothic nations of the Continent at a very early period; and from them to have been adopted by the English law. This is evidently the opinion of Sir Henry Spelman, who observes, that our Saxon ancestors derived from the Continent, the use of the Pound, (or place in which things distrained are to be secured) for, that among the laws of the Ripuarii, (Tit. 82. s. 2.) is found the following passage,

appellatione eam rem propriè contineri dicimus, quæ simul etiam traditur creditori, maximè si mobilis sit. At eam quæ sine traditione, nudâ conventione tenetur propriè hypothecæ appellatione contineri dicimus. Lexic. Jurid. voce Pignus. Et vide Spegelii Lexic Jurid. in eâdem voce. There was indeed the Pignus Prætorium, which was compulsory, but that was the result of a judicial proceeding.

CHAP. I. "*Si quis, peculium alienum in Messe adprehensum ad Parcum minare non permiserit, 15 Sol. Culpabilis judicetur.*" (*d*) Sir Henry Spelman adds, *Parci etiam meminit Lex Anglorum et Werinorum haud multo recentior, tit. 7. s. 1. Qui gregem equarum in parco furatus fuerit, in triplum componat.* These laws indeed regard only one kind of Distress, that of cattle doing damage on the land; but as they advert so explicitly to the impounding of the Distress, we may infer from them, that the general principle of the Law of Distresses, both as to the making and conducting of them, was already well known and established.

One of the most ancient causes for which Distresses were usually made in England, seems to have been the non-performance of the services which the tenant owed to his lord. These services during the early periods of the feudal system, consisted principally of military duties, many of which were of uncertain extent. On account of this uncertainty, it was not easy to estimate with precision the amount of the lord's claim; and therefore for the subtraction of such services, Distress was rather an unsuitable remedy: for as Fleta observes, "*In qualibet captione, tria principaliter requiruntur; videlicet, certus locus, certa causa, propter quam facta fuit, captio et seisina alicujus.*" (*e*) But afterwards when the personal service of the

(*d*) Spelm. Gloss. voce Parcus.

(*e*) Fleta lib. 2. cap. 49.

military tenants was commuted into a sum of money, called escuage, Distress became the regular method of recovering that and the other fruits of the military tenure; the damage the lord sustained, being now capable of a reduction to a certainty. (*f*)

The remedy of Distress did not however immediately succeed to the forfeiture of the feud; for after the rigour of the ancient system had in some degree relaxed with regard to the absolute forfeiture of the land, still, for the non-performance of any of the feudal duties, the lord was entitled to enter upon the tenant, and take the land into his own possession, until he had obtained a sufficient satisfaction for his damages. "But as this seisure "frequently disabled the tenant from making that "satisfaction, especially if he had no other lands, "this, after some time, was thought still too rigor-"ous; and in its stead was substituted, the seisure "of the cattle and other moveables found on the "land, and the detention of them as a pledge, un-"til the damages were answered." This was a "sufficient security to the lord, as it rarely hap-"pened, but that there was sufficient found to "answer his demand for one failure, and the te-"nant was not, (as not being deprived of his pos-"session) reduced to an incapacity of paying his "rent of services, and thereby recovering his "pledges." (*g*)

(*f*) Sullivan, lect. 10. (*g*) Sullivan ut supra.

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But this remedy of Distress, however mild and indulgent it may appear in comparison with the rigour and severity of the ancient laws of forfeiture, soon became in the hands of powerful lords, an instrument of great oppression; and was almost as grievous to the tenants as the forfeiture itself; "there being no difference to the tenant, between "the lords seizing the land itself, and turning the "tenant out of his possession; and his stripping "him of the whole produce or fruits of it at his "pleasure."

"And not only the produce of the farm, but "the inducta and illata, and every thing that was "brought on the land were liable to the lord's "distress. By these means all the plunder of the "war which the vassal had brought home, was "often carried off by the lord, and the Distress by "his power removed out of the reach of the tenant, "and all this on the slightest occasions."

"This power as it was practised by the lords, "did not only oppress the tenants, but put them "so entirely under the power of their lords, as to "enable them to bring great numbers of their "vassals into the field against their prince, and "thereby disturb the public peace of the king-"dom."

"There were yet two other inconveniences "which arose from the abuse of these distresses."

"The first was, that in the disputes and contests "which frequently arose between neighbouring "lords themselves, whilst each lord was endea- "vouring to enlarge his bounds, and encroach "on his neighbour's property, the tenants were "generally distrained by both: by which the "tenant was brought within the seigniory, and so "became subject to that feudal dependance and "service, which accompanied the military tenure."

"The other mischief was, that when the lords "had brought them under their dependance, they "would distrain them for the amerciaments of "their courts; and as the statute of Marlebridge "expresses it, *graves ultiones fecerint, et district- "iores quousque redemptiones receperint ad vo- "luntatem suam:* and what made the abuses the "more insupportable was, that these lords, *per "Ministros Domini Regis, justiciari non permit- "tant, nec sustineant quod per ipsos liberentur Dis- "trictiones, quos authoritate propria fecerint ad "voluntatem suam*, so that they seemed to throw off "the authority of the law, and to subvert the fun- "damental rule, that no property was to be altered "without the king's writ."

"But these oppressions ended with the distrac- "tions of the Baron wars, for towards the end of "the reign of Henry 3. there were particular laws "made to regulate the manner of distraining; and "not to suffer the lords to extend this remedy

CHAP. I. "beyond the mischief it was first introduced for; "which was no more, than to empower the lord by "seizing the chattels to oblige the tenant to per- "form the feudal services."

"These were to remain in the lord's hands as "pledges to compel the performance; and the de- "tention was no longer lawful, than the tenant re- "fused to do the services which were reserved by "the feudal contract." (*h*)

Various statutory provisions were made to check the abuses of the power of Distress. By the 10th chapter of Magna Charta it was forbidden, that any man should be distrained to do more service for a knight's fee or other freehold, than was really due: and the statute de districtione Scaccarii, 51 Henry 3. declared, that Distresses, whether made by the king, or a subject, should be reasonable; and confirms the rule of the ancient common law, that no man shall be distrained by his sheep, or beasts of the plough, whilst another sufficient Distress can be had.

But the most important regulations respecting the power of Distress, contained in any of our ancient statutes, seem to be those of the statute of Marlebridge; which inforces the former provision that a Distress shall not be great and unreasonable;

(*h*) Gilb. Distr. p. 2—4.

and enacts that persons making such Distress shall be grievously amerced. (*i*) CHAP. I.

The second chapter of the same statute (*k*) contains a confirmation of the common law in another respect; forbidding the lords to distrain for suits or services which were not due, or to take Distresses out of their own fee or jurisdiction. This provision was at that time of great importance, for it frequently happened, that by means of unlawful Distresses, the lords not only grievously oppressed their own tenants, but by the coercion of such Distresses, compelled other persons, who were not their tenants, to do suit or service to them. After they had by these means obtained, what the law terms a seisin of such services, the party distrained upon was no longer at liberty to treat the Distress as illegal, and make rescue of it; nor even to dispute the seisin thus tortiously gained, in an action of replevin, but was put to the more difficult and hazardous remedies of a *Contra formam Feoffamenti*, or *Ne injuste vexes*. (*l*)

The third chapter of the Statute of Marlebridge was made to repress one of the greatest evils, belonging to the right of Distress, which prevailed in those days of violence and oppression. For the lords not only made distresses without any

(*i*) Stat. Marleb. cap. 4.
(*k*) Confirmed by the Stat. of Westm. primer, cap. 16.
(*l*) *Penruddock's* Case, 5 Rep. 100. b. *Bevil's* Case, 4 Rep. 11. b.

CHAP. I. lawful cause, but frequently "kept them with "strong hand, and refused to permit even the "king's officers to make replevies of them:" by which means, a Distress was in fact converted into a lawless seisure and confiscation. To redress this intolerable injustice, it was enacted by the third chapter of the statute of Marlebridge, "That if "any, of what estate soever he be, will not suf- "fer such Distresses as he hath taken, to be deli- "vered by the king's officers, after the law and "custom of the realm; or will not suffer sum- "mons, attachments, or executions of judgments "given in the king's court, to be done according "to the law and custom of the realm as is afore- "said, he shall be punished by fine, as one that "will not obey the law, and that according to the "quantity of the offence."

But even this provision soon appeared to be in many cases a very ineffectual remedy; for the lords frequently drove the cattle distrained into their castles or fortresses, which were perfectly inaccessible to the king's officers, and whence it was therefore impossible to recover the Distress. To such lengths do they seem to have carried this lawless violence, that in the third year of king Edward the first, it was found necessary to enact, by the 17th chapter of the statute of Westminster primer, that if such lords did not, upon being duly warned, make deliverance of the Distress, the king should for such trespasses cause their castles

or fortresses to be beaten down and demolished, and that the lord should restore to the person distrained upon, double the value of the things distrained, or damage sustained by the Distress.

In these times, a Distress was frequently resorted to, for the purpose of extorting the payment of an illegal fine; for the lords used to procure plaints to be made in their courts against strangers; whereon process issued, to which they were compelled to put in pledges, or be fined at the will of the lord: and even the king's officers or sheriffs, whose duty it was to make Distresses by well-known bailiffs, were accustomed to make them by persons not known to be their bailiffs, to the intent, that the owner of the cattle might make rescous of them, for which the sheriff might extort money from him. (*m*) To remedy these abuses it was enacted by the 36th and 37th chapters of the statute of Westminster the second, 13 Ed. 1. that for such delinquencies, the lords should be fined to the king, and pay treble damages to the party grieved: and that the sheriffs should pay damages, and be otherwise grievously punished.

These various statutory provisions were however only made in affirmance of the common law, the remedies of which were found quite ineffectual. And as these statutes enacted penalties much more severe than those known to the common law, it is reasonable to suppose, that they contri-

(*m*) 2 Instit. 445.

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buted in some degree to check the evils to which they were applied. It is however probable, that their complete removal was ultimately produced, rather by the gradual improvement of social order, than by the immediate operation of laws, which were most frequently violated by those who enacted them.

There still however remained one great inconvenience in the conducting of the Distress, which was not fully remedied before the reign of Philip and Mary; I mean that of driving the cattle distrained to a distant pound, out of the county in which they were taken. This was indeed forbidden by the ancient statute of Marlebridge; but the remedy given by that statute being found ineffectual, it was enacted by the 1 & 2 Ph. & M. c. 12. that no Distresses should be driven except to a pound overt within the shire, and not above three miles from the place of the taking: nor be impounded in several places, so as to compel the party to sue several replevins, on pain of forty shillings and treble damages: and that no more than the sum of fourpence should be taken for impounding one Distress, or where less had been used, then less, under a penalty of five pounds, besides the excess of the sum taken to the party grieved.

This seems to have been the last occasion on which the legislature found it necessary to interfere, for the protection of persons liable to a Dis-

tress. From this period, its attention appears to have been confined to Distresses for rent in particular, and therein to be directed to a very different object; namely, that of improving the remedy of Distress in the hands of the landlord, so as to render it, what it was indeed always intended to be, an equitable, but, at the same time, an effectual remedy for the recovery of his rent.

In order to ascertain to what extent this remedy has been improved and enlarged by the provisions of these modern statutes, it is necessary to observe, that at the common law, a Distress for rent (and indeed every other Distress except that for an amerciament) when made, was only a pledge to be retained in the hands of the Distrainor; but could not be sold: and therefore was a very ineffectual remedy for the recovery of rent. For, as Mr. Justice Blackstone observes, "although such "a Distress put the owner to inconvenience, and "was therefore a punishment to him; yet if he "continued obstinate, and would make no satis-"faction, or payment, it was no remedy at all to "the Distrainor." (*n*) To obviate this inconvenience, it is provided by the statute 2 Wm. & M. c. 5, that in all cases of Distress for rent, upon any demise, lease or contract, if the tenant or owner do not, within five days after notice given to him of the cause of the Distress, replevy the same with sufficient security, the Distrainor, with

(*n*) Comm. Vol. 3. p. 14.

AP. I. the sheriff, under-sheriff or constable shall after appraisement thereof, by two sworn appraisers, sell the same towards satisfaction of the rent and charges, rendering the overplus, if any, to the owner of the goods distrained.

Among other rules of the common law relative to the subjects of a Distress, there was one, that things belonging to the freehold were not distrainable, and another, that such things only were to be distrained, as could be restored in as good plight, as that, in which they were taken. By the former of these rules, landlords were prevented from distraining growing crops on their tenant's land; and by the second, of taking corn after it had been cut: restrictions, which in fact deprived them of the best remedy for the recovery of their rents. To correct this inconvenience, they are by the stat. 11 Geo. 2. c. 19, empowered to distrain corn, grass, hops, fruits, roots, pulse, or other product of the land, and to cut and gather them when ripe, to be disposed of by appraisement in satisfaction of the rent; and by the before mentioned statute of Wm. and Mary, corn in sheaves, or cocks, or loose in the straw, or hay in barns, ricks, or otherwise, may be distrained, as well as other chattels.

The statute 8 Anne, c. 14. enables persons having rent in arrear upon any lease for life, years, or at will to distrain for such arrears within six months

possession of the tenant; which could not have been done at the common law. And the same statute contains a much more important provision, giving redress in a case, in which landlords were without remedy at the common law, namely, the clandestine and fraudulent removal of the tenant's goods from the premises demised, in order to avoid a Distress; for by that statute, they are empowered to follow and distrain the goods, within five days after such removal. This provision has however been enlarged and rendered more effectual by the stat. 11 Geo. 2. c. 19, which enacts, that the landlord may follow and distrain the goods wherever they may be found, within thirty days after such removal; and if they are locked up in any place, with the assistance of the peace officer of the parish, may break open the same, and take after the determination of the term, if made during the continuance of the landlord's title, and the goods: oath being first made, in case it is a dwelling-house, of a reasonable ground to suspect that such goods are concealed therein.

By the 10th sect. of the same statute, the party distraining for rent, is enabled to impound or secure the goods distrained, on any convenient part of the premises chargeable with the rent: which has obviated the inconvenience of an immediate removal of the Distress, without which, the Distrainor would have been liable, at the common law, to be treated as a trespasser.

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There was also another rule of the ancient common law on this subject, which perhaps tended more than any other to defeat the purposes of justice, and which indeed rendered Distress a very unacceptable remedy. This was, that if the party distraining were guilty of any irregularity in making or conducting the Distress, he thereby became a trespasser *ab initio:* a rule deduced from an ancient maxim of the common law, much more remarkable for its rigour than its equity; namely, that whoever pursued a legal remedy in any other way than that prescribed by the law, should be considered as having purposed from the beginning, to commit a tortious act. This maxim when applied to a Distress for rent, after the statute of William and Mary had authorized its sale in a particular manner therein prescribed, rendered such a Distress a very difficult and hazardous proceeding. The evil was however at length remedied by the 19 sect. of the stat. 11 Geo. 2. c. 19. by which it is provided, that for any irregularity committed in making or conducting a Distress for rents, the party guilty of it, shall not be deemed a trespassor *ab initio*, but that damages shall be recovered by the person aggrieved by such act, in proportion to the injury sustained.

The last great statutory provision respecting the remedy of Distress for rent, is that contained in the 5th sect. of the stat. 4 Geo. 2. c. 28, which gives the like remedy by Distress, and impounding

and selling the same, in cases of rents seck, rents of assize, and chief rents, which had been answered and paid for three years, within the space of twenty years before the first day of that session of parliament, as for rent reserved on lease. A provision, the great importance of which will hereafter appear in our further inquiries into the nature of a Distress for rent.

Such are the principal provisions which the legislature has thought fit to enact, for the purpose of improving the remedy of Distress for the recovery of rent. And by these means, has a Distress, which was formerly, in some cases, a very hazardous, and in others, a very ineffectual proceeding, been rendered one of the most equitable and efficient remedies known to the English law.

Of the causes of a Distress.

Although the recovery of rent in arrear is certainly the most usual cause of a Distress, yet there are various other things, in respect of which a Distress may be made.

Distress for Services, Suits, Reliefs, or Customs.

Some of these are, in their origin, very analogous to that of rent; because arising out of the same relation of lord and tenant; as, First, a Distress for suit, at the lord's courts, or services due from the tenant to his lord, in respect of his land. Secondly, for a relief due upon the alienation of it. Thirdly, for a Distress made by virtue of a cus-

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tom established in some manors, or other particular districts, intitling the lord to require the performance of some duty, or the payment of some demand, to compel the satisfaction of which, the custom also enables the lord to make a Distress on the goods of the party who is guilty of default.

The last of these Distresses depends altogether on the particular custom upon which it arises, but the former for suit, services or reliefs, are recognized and regulated by the rules of the ancient common law, and are of common right: (*o*) being indeed that remedy for the subtraction of services, which was substituted for the more rigorous law of forfeiture under the feudal system.

Whilst the ancient military tenures subsisted in this country, these services due to the lord, were as various as the tenures to which they belonged. There were tenures by knight's service, grand and petit serjeanty, escuage, homage, and other different kinds, on which particular services were due; for the subtraction of which, the lord was entitled to distrain. These services accordingly formed a very considerable part of the ancient laws of Distress: but our inquiries concerning them are now greatly abridged, by the operation of the stat. 12 Car. 2. c. 24, which has completely abolished all the ancient military tenures, with their

(*o*) Co. Litt. 46.

several incidents, and converted them into free and common socage. And therefore, such services only as are incident to this latter tenure, can now be made the subject of a Distress.

For Fines and Amerciaments.

A fourth cause for which a Distress may be made, is for a fine imposed, or an amerciament made by a court leet. This court, which is of criminal jurisdiction, was originally in the hands of the king, but was afterwards, in some cases, granted to a subject being usually the lord of some honor or manor. (*p*) To this court, is incident the right of imposing a fine for some offences, and of making by a jury an amerciament for others, committed by persons within its jurisdiction; (*q*) and for such fine or amerciament, a Distress may be made of common right. (*r*)

For Tolls and Port Duties.

A fifth cause of Distress is that of tolls and port duties. These tolls are certain sums payable in respect of things sold in a public fair or market, within a particular franchise or manor; which tolls are of right due to the lord, to whom such fair or market belongs: and this being of itself a matter of public benefit, the law allows the lord or owner of the fair or market to distrain for such toll, due therein. Port duties are certain sums of money,

(*p*) 2 Instit. 70—74. 4 Inst. 261.

(*q*) *Griesley's* Case, 8 Rep. 40.

(*r*) Id. 41. a.

CHAP. I. due to the owners of a port or haven, for ships coming into, or otherwise using the same; and for which duties a Distress may also be made.

For Damage Feasant.

A sixth cause "for which Distresses may be "taken, is where a man finds beasts of a stranger "wandering in his grounds damage feasant, that is, "doing him hurt or damage, by treading down his "grass, or the like; in which case, the owner of "the soil may distrain them, till satisfaction be "made him for the injury he has thereby sus-"tained." (*s*)

For Duties and Penalties by particular Statutes.

"Lastly, For several duties and penalties in-"flicted by special acts of parliament, (as for as-"sessments made by commissioners of sewers, or "for the relief of the poor) remedy by Distress "and sale is given; for the particulars of which," says Mr. Justice Blackstone, "we must have re-"course to the statutes themselves, remarking "only, that such Distresses are partly analogous "to the ancient Distress at common law, as being "repleviable and the like, but more resembling "the common law process of execution, by seizing "and selling the goods of the debtor, under a writ "of *fieri facias*." (*t*)

Having thus taken a general view of the origin and progress of the law of Distresses, and enume-

(*s*) Bl. Comm. 3. 7. (*t*) Ibid.

rated the several causes for which they may be made, we may proceed to inquire more minutely into the first and principal of them, namely, that of a Distress for rent. CHAP. I.

CHAPTER II.

Of a Distress for Rent, with relation to the several Kinds of Rent.

UNDER the ancient system of English tenures, when lands were generally held by military service, "the feudatories being under frequent incapacities "of cultivating and manuring their own lands, soon "found it necessary to commit part of them to "inferior tenants, obliging them to such returns "in service, corn, cattle, or money, as might ena- "ble the chief feudatories to attend their military "duties without distraction, which returns or re- "ditus were the original of rents." (*u*)

Rent-Service. When rents were thus created, it was natural, that the lords should be anxious to secure the payment of them, by the most ready and expeditious means: and therefore, to the principal kind of rent, namely that of rent-service, the remedy of Distress was considered as incident of common right.

(*u*) Bl. Comm. 2. 57.

Now rent-service was where the tenant held the land of his lord by fealty and certain rent, or by a certain rent together with homage, fealty, or other services. (*x*) It being called rent-service, because it had some corporal service, as fealty at least, belonging to it. (*y*) And to rent-service, Distress was incident, whether such rent were created by deed or parol, (*z*) provided, that the reversion were in the landlord or lessor making the Distress. (*a*)

Rent Charge.

The next species of rent known to the ancient common law, was a rent-charge; which was where a man by deed indented, or by deed-poll made a gift in tail, the remainder over in fee; or a lease for life, with such remainder over; or a feoffment in fee; and by the same deed, reserved to himself and his heirs a certain rent; and that if the rent should be unpaid, he and his heirs might distrain. Such rent was a rent charge, because the lands were charged with such Distress by force of the deed only, and not of common right. (*b*)

Rent Seck.

The third species of rent, at the common law, was called a rent-seck, which was, where a man had granted a rent by deed, without a clause of Distress; and for this rent, if in arrear, there was no Distress at the common law. (*c*)

(*x*) Litt. Sect. 213.
(*y*) Co. Litt. 142. a.
(*z*) Litt. Sect. 214.
(*a*) Litt. Sect. 215. Co. Litt. 143. a.
(*b*) Litt. Sect. 217. 219.
(*c*) Bl. Comm. 3, 42. Litt. Sect. 217. 218.

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This was the most ancient species of rent-seck; being in effect a rent-charge without the clause of Distress: but there was another species of rent-seck, which bore the same relation to a rent-service, that the former species did to a rent-charge. And this was, when the rent was separated from the reversion or services, as homage or fealty, by its union with which, it was originally a rent-service. This, as we shall hereafter see, might arise in various ways, but it was principally occasioned by the operation of the statute of *Quia emptores Terrarum*, 18 Edw. 1. which enacted, that where a tenant aliened to another his whole estate, the alienee should hold immediately of the lord, and not of the alienor: by which means, all reversion and services being divested out of the alienor, he could not distrain for a rent reserved upon his alienation, but it was in his hands a rent-seck. (*d*)

Out of what, Rent may be reserved.

The remedy of Distress seems to have been anciently considered as so essential to the nature of a rent, that if a man granted a mere right of Distress in a particular manor to a certain amount, it operated as a good reservation of a rent. (*e*) On the other hand, it became a rule, that a rent could not be granted out of a pischary, common, franchise, or other incorporeal hereditaments; but only out of lands or tenements, to which the

(*d*) See Sulliv. Lect. 10. (*e*) Co. Litt. 147. a.

grantee might have recourse to distrain: (*f*) nor could the agreement of the parties, alter the law in this respect. (*g*) Therefore a rent could not issue out of a rent, because there could not be an assize of it. (*h*) Nor out of a hundred, fair or advowson. (*i*) It was also formerly held, that a payment reserved upon a lease of tithes was not to be considered as a rent, because it was to issue out of an incorporeal hereditament, which could not be distrained, nor put in view in an assize. (*k*) Such a reservation has, however been since considered as creating a rent, so far as to be capable of being suspended by eviction; (*l*) but although it will bind the lessee by way of contract, it cannot be made the subject of a Distress. (*m*) The produce of the land however, is not incorporeal, and therefore a lease of the vesture or herbage reserving rent is good, and the lessor may distrain the cattle on the land. (*n*) And the king may reserve a rent out of any incorporeal hereditament, because, he may by his prerogative, distrain either for a rent-service or rent-charge, on all the lands of the lessee. (*o*)

(*f*) Co. Litt. 47. a. 144. a.

(*g*) *Butt's* Case, 7 Rep. 23. b.

(*h*) Bro. Abr. Assize, pl. 2.

(*i*) *Butt's* Case, 7 Rep. 23.

(*k*) *Talentine* v. *Denton*, Cro. Jac. 111. *Rickman* v. *Garth*, id. 173.

(*l*) *Dalston* v. *Reeve*, Ld. Raym. 77.

(*m*) *Dean and Chapter of Windsor* v. *Gover*, 2 Saund. 302. et not. *Bally* v. *Wells*, 3 Wils. 25. Co. Litt. 47. a.

(*n*) Co. Litt. ibid.

(*o*) Lord *Mountjoy's* Case, 5 Rep. 4. Bro. Abr. Distresse, pl. 49.

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As a rent could not issue out of an incorporeal hereditament, so, it was held that it could not be reserved out of a mere personal chattel: and that a covenant for payment of it, would not bind the assignee. (*p*) Upon which ground it was much doubted, whether rent reserved upon a lease of land with stock upon it, or on the demise of a ready-furnished house or lodgings, could be distrained for, as the greater part of the rent must be considered as paid for the goods: but it has lately been determined, that it can, because in contemplation of law, the whole rent issues out of the land or premises demised. (*q*)

Certainty of Rent.

As it is necessary that the rent should be reserved out of a corporeal hereditament; so it is essential to the nature of a rent, or service, that it be certain in its quantity, extent and time of payment; or at least be capable of being reduced to such certainty. (*r*) And therefore a rent reserved after the rate of £18 a year was held bad for uncertainty, in not specifying the nature of the rent, whether in money or in kind, nor the periods of its payment. (*s*) And for the like reason, at the ancient common law, the lord could not distrain upon the tenant in Frankalmoigne, because

(*p*) *Spencer's* Case, 5 Rep. 17.

(*q*) *Newman* v. *Anderton*, 2 New Rep. 224.

(*r*) Co. Litt. 96. a.

(*s*) *Parker* v. *Harris*, 4 Mod. 78. S. C. 1 Salk. 262. If however the rent had been ascertained, a general reservation would have made it payable yearly. *Cole* v. *Sury*, Latch. 264.

his duty was to perform divine services, uncertain both in time and number. (*t*) But it was in all cases sufficient if the rent could be reduced to a certainty; and therefore, a man might hold of his lord to shear all the sheep depasturing within his manor, because the number depasturing within the manor could always be ascertained. (*u*)

By what Deed, &c. to be reserved.

It is also essential to the nature of a rent, that it should be reserved by a sufficient deed or conveyance; that is, by some deed or conveyance passing an estate to the tenant, or enlarging an estate already in him. (*x*) For although a reservation of rent might be made, either by an indenture or deed poll, provided an estate passed by it, to the tenant; yet, any reservation in a deed, by which no estate passed was void: although a right, without an estate, might pass by the same deed. (*y*) And if the deed operated by any extinguishment or surrender of the grantor's estate; in that case the reservation was void, because the reversion was gone; (*z*) although a mere grant of the reversion itself to another person, would have passed the rent as being incident to it. (*a*)

By the common law, a rent could not be reserved upon a bargain and sale; because only a use, but no estate, in the land passed by such deed,

(*t*) Litt. Sect. 136.
(*u*) Co. Litt. 96. a.
(*x*) Bac. Abr. Rent C.
(*y*) Ibid.
(*z*) Ibid.
(*a*) Litt. Sect. 229.

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before the statute of uses. (*b*) But now, by that statute, the possession being executed to the use, the bargainor may distrain for the rent. (*c*)

To whom to be reserved.

It is also a maxim of the common law, in order to prevent the maintenance of suits, that rent cannot be reserved to a stranger; but only to the feoffer, donor, lessor, or his heirs; for they only have a privity of estate. (*d*) This rule does not however extend to a lease by two joint-tenants reserving rent to one of them, for he has a privity of contract and estate. (*e*) Nor does it extend to the king, who, in general, may reserve a rent to a stranger; but, where such reservation was made to an officer of the crown removeable at pleasure, it was held to be void. (*f*)

To be reserved conformably to the Estate.

Rent should also be reserved conformably to the nature of the estate: for in some cases, if the reservation be bad, it will destroy the rent. As where a lease for years was made by a tenant in fee simple, and his son and heir apparent, to commence after the death of the father, reserving the rent to the son by name, but not reserving it to the heir or heirs of the father: it was held that the son could not take the rent at all, for it was only as heir of his father that he could take it; but neither

(*b*) 27 Hy. 8. c. 10.
(*c*) Co. Litt. 144. a.
(*d*) Litt. Sect. 346. Co. 36. Litt. 214.
(*e*) Litt. Ibid.
(*f*) *Anonymous*, Ld. Raym.

to the heir or heirs of the father was it reserved. (*g*) An improper reservation will not however, in general, destroy the rent: for if lessee for hundred years should underlet for fifty years, reserving a rent to him and his heirs, during the term; this rent, it seems, would go to the executor. (*h*) So if tenant in tail make a lease and reserve the rent generally to his heirs, it will go to his heirs in tail. (*i*) Or if a rent-charge be granted out of Gavelkind lands, to a man and his heirs, it will descend according to the nature of the land. (*k*) And where there is no specification of the persons to whom it is reserved, the rent will enure according to the nature of the estate: for the law, as it has been said by Lord Hale, "uses all industry imaginable to conform the reservation to the estate." (*l*) But, where there is a specific reservation of the rent to the lessor, without naming any other persons, as heirs, executors, &c. to whom it shall be paid; the rent will be confined to the person to whom it is so reserved, and will cease at his death; (*m*) unless it be reserved payable during the term, which will preserve the rent until the end of the term, and the law will distribute it according to the nature of the estate. (*n*)

(*g*) *Oates* v. *Frith*, Hob. 87.

(*h*) *Sacheverell* v. *Frogate*, 1 Vent. 162.

(*i*) Ibid.

(*k*) *Randall* v. *Jenkins*, 1 Mod. Rep. 110. S. C. 2 Lev. 87.

(*l*) *Sacheverell* v. *Frogate*, ut supra.

(*m*) *Cother* v. *Merrick*, Hardr. 95.

(*n*) *Sacheverell* v. *Frogate*, 1 Vent. 162.

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Incident to the Reversion and Services.

It has been already observed, that the rent was considered as incident to the reversion, although not so inseparably incident to it, as fealty, or other services: for these could not be reserved, if the remainder or reversion were granted over. (*o*) But still, the separation of the rent from the reversion, had, in many cases, the effect of reducing a rent-service, or rent-charge, to a rent-seck. Thus, if a man granted to another a rent-service by deed, reserving to himself the reversion, and the tenant attorned to the grantee; such rent was, in the hands of the grantee, only a rent-seck. (*p*) And the same effect followed upon a separation of the rent from the fealty or other services. As where the tenant held by fealty and certain rent, and the lord reserving to himself the fealty, granted the rent to another with a clause of Distress, and the tenant attorned, this also became a rent-seck; because, although the rent might be separated from the fealty, yet the Distress could not; but necessarily followed the seigniory in the hands of the lord who had reserved to himself the fealty: for otherwise, the tenant would have been liable to two Distresses, which cannot happen but by act of law. (*q*) And therefore when the rent had once become a rent-seck, it seems, that the lord could not afterwards grant it with a clause of Distress. (*r*) And where the Distress was an inseparable incident, as it was

(*o*) Co. Litt. 143. a. 151. b. Litt. 150. b. 153. a. 164. b.
(*p*) Litt. Sect. 228.
(*q*) Litt. Sect. 225. Co.
(*r*) Litt. Sect. 227.

to fealty, a release of the Distress reserving the fealty would have been void. (*s*) CHAP. II.

There seem to have been, however, some cases, in which a rent-service might be so far changed, as to lose its principal qualities, without being reduced to a mere rent-seck. As when there were Lord Paramount, Mesne and Tenant, and by the act of the lord and tenant, to which the Mesne was no party, the rent-service due to him from the tenant, was destroyed as a rent-service, by coming into the hands of the lord, who could not hold of the mesne, there the rent was considered as still due to the Mesne, not strictly as a rent-service, but yet as a rent distrainable of common right. (*t*)

So by construction of law, a rent is sometimes deemed to be a rent-charge, without an express clause of Distress: as in the case of Coparceners, where upon partition a rent is reserved payable by one Coparcener to another, for equality of partition: this rent may be distrained for of common right, without a reservation of Distress. (*u*)

(*s*) Co. Litt. 151. b.

(*t*) Litt. Sect. 231, 232. Co. Litt. 153. a. and Harg. note (1) ibid. *Bevil's* Case, 4 Rep. 9. b. and *Fawkner* v. *Bellingham.* Sir W. Jo. Rep. 234. et seq.

(*u*) Litt. Sect. 252. 253. and Harg. note (1) on Co. Litt. 153. a.

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Seisin of the Rent.

It was not however sufficient, at the common law, to support a Distress for rent, that such rent should be properly reserved or granted. It was also necessary, that the party distraining should have a seisin of the rent; without which, there was no privity between him and the tenant. And therefore before the stat. 4 Anne, c. 16, had rendered attornment in future, unnecessary, it was requisite upon the grant of a rent-charge or rent-service, that the tenant should attorn to the grantee, in order to give him a seisin in law of the rent, without which the grantee could not distrain. (*x*) And even this seisin in law was not sufficient to support an assize, or other real action for the rent; for which actual seisin by receipt of a part of the rent was required. (*y*) This latter seisin was not however necessary for a Distress, because, except in a very few cases, (such as a seisin of incroachment tortiously gained by coercion of Distress;) the tenant was not permitted to dispute the actual seisin of his lord, in a replevin. (*z*) But since the statute 4 Anne, c. 16, the doctrine of seisin with relation to a Distress for rent, has become nearly obsolete. There are however some cases, in which it may still come in question; as in a Distress for an ancient rent-charge, created before that act. For the stat. 32 Hen. 8. c. 2. limits the avowant for a rent-service or rent charge to allege a seisin in

(*x*) Co. Litt. 309. 311.
(*y*) Litt. Sect. 235.
(*z*) *Bevil's* Case, 4 Rep. 9. a. 11. b.

the possession of his ancestor or predecessor, or of himself, within fifty years before the avowry. Now, a rent-charge, if created before the statute 4 Anne, c. 16, is not within that act, (*a*) nor, is any rent-charge within the stat. 11 Geo. 2. c. 19, entitling the distrainor to avow generally for rents, without alleging a seisin thereof: (*b*) and therefore, such ancient rent-charge still continues under the operation of the act 32 Hen. 8. c. 2. But as it has been determined, that this statute does not require an actual seisin, by receipt of the rent, but only a seisin in law, (*c*) it would perhaps be satisfied by shewing any act or assent on the part of the tenant, which would have amounted to an implied attornment at the common law. (*d*)

There were some other species of ancient rents besides those which have been already considered; such as fee farms, rents of assize, and chief rents; but with relation to the remedy of Distress, all rents of whatever description are reducible to one or other of the three great divisions of rent-service, rent-charge, or rent-seck. (*e*) Thus, a fee

(*a*) *Long* v. *Buckeridge*, 1 Stra. 106.

(*b*) *Lindon* v. *Collins*, Willes, 429. *Bulpit* v. *Clarke*, 1 New Rep. 56.

(*c*) Ibid. 10. And see *Faukner* v. *Bellingham*, Hetley, 36. *Foster*'s Case, 8 Rep. 64.

(*d*) *Anonymous*, 3 Leon. 17. *Bevil*'s Case, 4 Rep. 12.

(*e*) Bl. Comm. 2 V. p. 42.

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Fee Farm Rents.

farm rent, if created before the statute of *Quia emptores Terrarum*, (*f*) seems to be a rent-service with fealty annexed to it: (*g*) if created after that statute, (which considered strictly as a fee farm rent, it cannot be) it seems to be in the nature of a rent-charge, if reserved with a clause of Distress; and a rent-seck, if reserved without it. (*h*) And therefore, if such a rent be of modern creation, Distress is not incident to it, unless it be expressly reserved. (*i*)

Rents of Assize, &c.

Rents of assize are defined, by Lord Coke, to have been certain rents of the freeholders and ancient copyholders; and so called, because they were assised and certain, and thereby distinguished from the *reditus mobiles*, or farm rents for life, years or at will, which were variable and uncertain. (*k*) Chief rents seem to have been only another name given to the rents paid by the ancient freeholders. (*l*) And both the assize and chief rents were originally of the nature of rent-service.

The last species of rent which remains to be mentioned, is that of copyhold rents, paid by the tenants of a manor, to the lord, for their tene-

(*f*) 18 Edw. I.
(*g*) Spelm. Gloss. voce Feodi Firma. Terms de la Ley voce Fee Farm.
(*h*) Harg. note (5) on Co. Litt. 144. a, *Bradbury* v. *Wright*. Doug. 627. et not.
(*i*) Doug. Rep ibid.
(*k*) 2 Instit. 19.
(*l*) Bl. Comm. 2 V. 43.

ments holden by copy of court roll. As fealty was always incident to this species of tenure, these rents are in their very nature rent-services, and as such, have always been considered, to be distrainable of common right. (*m*)

These several kinds of rent, thus differed at the common law, with respect to the remedy of Distress, as they belonged to one or other of the three kinds, of rent-service, rent-charge, and rent-seck: and so they in effect continued, until the reign of King George the second. For although some statutory provisions had been made, enabling particular persons to distrain for rent, who could not before distrain at the common law; (*n*) still, the great distinctions between the different kinds of rent, with respect to the power of Distress, remained, until they were finally and completely abolished by the stat. 4 Geo. 2. c. 28. s. 5, by which it was enacted; that there should be the like remedy by Distress in cases of rents-seck, rents of assize, and chief rents, which had been duly paid for the space of three years, within twenty years, before the first day of the session in which the act was passed, or which should be thereafter created, as in case of rent reserved upon lease. And distress therefore now belongs equally to every species of rent,

(*m*) *Laugher* v. *Humphrey*, Cro. Eliz. 524.

(*n*) As the Stat. of 32 Hy. 8. c. 37.

CHAP. II. whether rent-service, rent-charge, rent-seck, rent of assize, or chief rent; and whether reserved by deed or parol: provided in the case of the three latter species of rents, that they have been created since that statute, or that they have been paid during the time, and within the period therein prescribed.

CHAPTER III.

Of the Persons who are entitled, in respect of their Estate or Interest, to distrain for Rent.

In considering the several kinds of rent which were recognized by the common law, I have already had occasion to advert to the relation, which subsisted between the nature of the rent, and the reversion in the premises out of which it was granted or reserved; and also, between the rent, and the other services, with which it might be connected. And we have seen, that at the common law, to have a Distress for a rent, as of common right, it was in the first place necessary, that the lord or lessor making the Distress, should have the reversion in himself. Secondly, that the rent should be reserved out of a corporeal hereditament. Thirdly, that it should be certain in quantity and duration. Fourthly, that it should be reserved by a sufficient deed or conveyance. And Lastly, that it should be properly reserved, in re-

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spect of the persons to whom it is payable. These several requisites may therefore be regarded as essential to the very nature of a rent, as it stood at the common law.

Of the Apportionment, Suspension, and Extinction of Rents.

From the preceding inquiry it also appears, that rent is regarded as of a two-fold nature. First, as something issuing out of the land in respect of which it is granted or reserved: and, Secondly, as an acknowledgment made by the tenant to the lord of his fealty or tenure. From this two-fold consideration, have arisen the doctrine, of the apportionment, suspension, and extinction of rents. For, considering the rent as something issuing out of the land, it became necessary to determine, whether the rent should be taken as an entire thing incapable of division, and so inseparably attached to the whole land out of which it issued, and the grantor's estate therein, that, by the severance of any part of the land from the remainder, or by the grantor's departing with any portion of his estate in the land, the rent should be wholly destroyed: or whether, notwithstanding its general entirety, it should be considered, in some cases, as only partially extinguished; and in others, as dividing itself into different portions following respectively the different parts of the land, or of the estate therein, as the same might be changed by the acts of the party, or the law. The latter of these principles was adopted, and that adoption

gave birth to the doctrine of the apportionment of rents. CHAP. III.

On the other hand, considering the rent as something belonging essentially to the relation of landlord and tenant, and a fruit of the tenure; it was obvious, that those things which were capable of affecting that relation of tenure, should be deemed to affect the rent itself. For, as the tenant owed allegiance and fidelity to his lord, so did the lord owe protection to his tenant; and therefore, if the lord did any act which impeached or destroyed the estate of his tenant, it was fit, that he should lose the rent which was due from the tenant, only in consideration of being permitted to enjoy the lands demised. This gave rise to the doctrine of the suspension or extinction of rents.

When the rent was held to be thus capable of extinction by the acts of the lord, it of course became a rule that if the lord evicted or ousted the tenant of the land, the whole rent should cease. But as the tortious acts of the lord might be either of a general nature extending to every part of the tenant's land; or partial, affecting only some portion of it; and as in their duration, they might in some cases be temporary, and in others, commensurate with the remainder of the tenant's term: it became necessary to consider, how far a rent could be partially suspended, or partially extin-

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guished; and this of course gave rise to various distinctions, in respect of the different acts, by which such suspension or extinction might be effected.

It was not however, only by a tortious act of the lord, that the existence of the rent might be destroyed; for considering it as arising out of a tenure, it is evident, that a rent cannot exist, where there cannot be a real or implied tenancy. And as a man cannot hold land of himself, it of course follows, that where after the creation of a rent, the land out of which it issues, comes into the possession of him, to whom the rent is reserved, by such unity of possession, the rent is in contemplation of law extinguished.—And therefore, if he who has the reversion purchase the tenant's term in the land, the rent becomes extinct. If he purchase the whole estate in part of the land, the rent will in such case be apportioned. But if he purchase part of the estate in the land, or take an under-lease of the land itself, this is a suspension, but not an extinguishment; for when the under lease expires, the rent revives. (*o*)

Rents being thus generally capable of apportionment, suspension, and extinction, and the remedy of Distress in all cases depending on the nature and existence of the rent, it is necessary to

(*o*) *Hodgkins* v. *Thornborough*, Pollexf. 142.

inquire, how far the doctrine of apportionment, suspension, and extinction, applies to the different kinds of rent, which may be made the subjects of a Distress.

Of the Apportionment, &c. of a Rent-Service.

Rent-service was capable of apportionment even at the common law, before the statute of *Quiá emptores Terrarum.* (*p*) But by the second chapter of that statute, it was expressly provided, that when the tenant sold a part of the lands which he held of his lord, the feoffee should hold it of the lord, charged with the services, for so much as appertained to the parcel sold. There were however, various kinds of rent-service not within that statute, which were apportionable at the common law, (*q*) either by the act of law, or the act of the party. As if the lessor recovered part of the land in an action of waste, or for a forfeiture, there by the act of law the rent was apportioned: (*r*) and although it has been said, that there was no apportionment of rent at common law, by the act of the party; (*s*) yet it was clearly otherwise; for if a man made a lease for life or years, reserving a rent, and afterwards accepted a surrender of part of the land from the lessee, in that case the rent was apportioned: so, if the lessor granted part of the reversion to a stranger, the rent was apportioned, as being incident to the reversion. (*t*) Or,

(*p*) 18 Edw. 1. Co Litt. 148. a.
(*q*) Co. Litt. ibid.
(*r*) Ibid.
(*s*) See Vin. Abr. Apport. A. 15.
(*t*) Co. Litt. 148. a.

CHAP. III. if the tenant or lessee upon the performance of a condition acquired the reversion in part of the land; in that case also there was an apportionment of the rent. (*u*)

But in the apportionment of rents, there is a difference between the grant of a rent, and the reservation of a rent. For if a man be seised of two acres of land, of one in fee-simple, and of the other in tail, and by deed grant a rent out of both, in fee, in tail, or for life, and die, the land intailed is discharged, and the land in fee-simple remains charged with the whole rent: which is taking it most strongly against the grantor. But if he make a gift in tail, or a lease for life, or years of both acres, reserving a rent, and die; and the issue in tail avoid the gift or lease; the rent will be apportioned. For the rent being reserved out of the whole land, it is reasonable that when there is an eviction as to a part of the land, by a title paramount, the donee or lessee should not be charged with the whole rent, but that it should be apportioned rateably according to the value of the land. (*x*)

If a man who has a rent-service purchase part of the land out of which the rent issues, this does not extinguish the whole rent, but only a parcel of it: although it is otherwise in the case of a rent-charge. (*y*) For here, the rent-service may

(*u*) Co. Litt. 148. b.
(*x*) Ibid.
(*y*) V. post p. 48.

be apportioned according to the value of the land, unless it be of a nature incapable of apportionment, as to render yearly a horse or a spear. (*z*) But this, says Lord Coke, is intended of a purchase in fee-simple, for if there be lord and tenant of forty acres of land, by fealty and twenty shillings rent; and the tenant make a gift in tail, or a lease for life or years of parcel thereof to the lord, in this case, the rent shall not be apportioned for any part, but shall be suspended for the whole. For a rent-service may be extinct for a part, and apportioned for the rest; but it cannot be suspended in part, by the act of the party, and in esse for the other part. (*a*) This latter rule must however be understood with some limitation; for it certainly does not extend to those acts of the party, which are made for the assertion of a legal right; nor where the lord takes an interest or profit in the land not inconsistent with the tenant's estate: as where by the licence and consent of the tenant, the lord enters into and enjoys a part of the land. (*b*) But if the lessor tortiously enter upon the lessee for life or years, and put out or disseize him of part of the land, there, the rent is suspended for the whole, and shall not be apportioned for any part; for this, says Lord Hale, would be for a man to apportion his own wrong: (*c*) but where he enters lawfully upon a surrender or forfeiture,

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(*z*) Litt. Sect. 222.
(*a*) Co. Litt. 148. b.
(*b*) *Hodgkins* v. *Robson*, 1 Vent. 277.
(*c*) Ibid.

CHAP. III. there, the rent is suspended or extinguished only for that part, and subsists by apportionment for the remainder. (*d*)

By act of law however, a rent-service might in many cases be suspended in part, and in esse for part. As when the guardian in chivalry entered into the land of his Ward within age, the seigniory was suspended; but if the wife of the tenant were endowed of a third part of the tenancy, it was held that he should pay to the lord a third part of the rent. (*e*)

Distress by the Lord for a Rent-Service.

The foregoing principles, regulating the doctrine of apportionment, suspension, and extinction, with respect to a rent-service, united with the general rules, which govern the reservation of rents, determine in what cases the lord is entitled to distrain for a rent-service, and also, the quantity of rent which he may thereby recover. For such a Distress being of common right, where the rent is properly reserved, the remedy of Distress in the hands of the lord follows it of course to the extent of such reservation. It is only therefore necessary, to make a few remarks on the right of the lord to distrain for a rent-service, when he takes by escheat.

Lord by Escheat.

In general, the lord is not entitled to the escheat

(*d*) Co. Litt. 148. b. (*e*) Ibid.

of land or rent, unless *pro defectu tenentis.* (*f*) So that if the heirship fail without destroying the tenancy to the lord, he will not take by escheat, and therefore if his tenant be grantee of a rent-charge in fee-simple, and die without heirs, the rent will not escheat, but be extinguished; (*g*) and no one being intitled to it, the tenant will hold the land discharged of the rent. If the tenant have a reversion in the lands holden, such reversion is a part of his tenancy, and will escheat to the lord. (*h*) And therefore, if the tenant lease for life, rendering rent to himself and his heirs, and he die without heirs, so that the reversion escheat to the lord, and afterwards the rent be in arrear, the lord may distrain; (*i*) for here the rent is incident to the reversion, and goes with the reversion into the hands of the lord. (*k*)

The lord taking by escheat, is considered as taking by a title paramount that of his tenant; and therefore, when attornment would otherwise have been necessary, it was held, that the lord distraining for a rent reserved upon land, which afterwards came to him by escheat, might make such Distress, without any attornment by him from whom the rent was due. (*l*)

(*f*) *Attorney Gen.* v. *Sands*, Hardr. 494.
(*g*) Id. 496.
(*h*) Vin. Abr. Escheat C. 113.
(*i*) Litt. Sect. 348.
(*k*) Co. Litt. 215. b.
(*l*) *Mallory's* Case, 5 Rep.

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At the common law, when the lord distrained for a rent-service, by title of escheat, or otherwise, such Distress was made in respect of his seigniory. And upon this principle it was held, that pending a plea to try the seigniory of the lord, he could not make a Distress for the tenant's rent. So that, if the lord distrained for rent, and the tenant replevied, and to the avowry of the lord pleaded *hors de son fee*, and pending that plea, the lord distrained for rent subsequently accrued; it was held, that the tenant was entitled to his writ of *recaption;* because it was fit he should not be again distrained, until the seigniory of the lord had been tried in the first plea: but if he had pleaded, *riens arrere*, or any other plea admitting the tenure, the lord would have been entitled to make a second Distress. (*m*)

Distress for a Rent-Charge.

To a rent-charge, the remedy of Distress was not incident of common right, but only by virtue of the special clause of Distress. (*n*) And where a man by deed granted to another a rent-charge, unless the person of the grantor were specially exempted, by the same, or another deed, the grantee might elect, either to sue a writ of annuity against the grantor, or distrain for the rent. (*o*) In the grant of a rent-charge, it is held, that the rent may issue out of one parcel of land, and the Distress

(*m*) Bro. Distr. pl. 14. F. N. B. 71.

(*n*) Ante, p. 23.

(*o*) Litt. Sect. 219 220. Co. Litt. 145. a. 146. b.

be reserved in another: and in this case, whether the lands lie within the same or different countries, it should seem, that the Distress can be taken only on the land, in which it is reserved. (*p*) But although the Distress may be thus separated from the rent as to the locality of the land, it must still ensue the nature of the estate therein. And therefore, if there be a freehold estate in the rent, as if granted for life or in tail, and the Distress be only reserved for a term of years, the reservation is void, and the whole rent is seck. (*q*) But if a rent be granted to two persons and their heirs, with a clause of Distress to only one of them and his heirs, and he die, still the survivor may distrain, for the Distress is appurtenant to the estate in the rent. (*r*) And upon the same principle it was held, that the grantee of a rent-charge in fee who had levied a fine of it, to the use of himself and wife in tail, had so far the seisin of the same estate in the rent, as to be capable of distraining for the arrears due before the fine levied. (*s*) So the *Cestuy que use* of a rent-charge, since the statute of uses, is entitled to distrain. (*t*) But in all cases, the privity of estate must remain; and therefore, if one seised in fee of a rent, grant it to another in fee, he cannot afterwards distrain for the arrears; because he has by his own act

(*p*) Litt. Sect. 221. Co. Litt. 147.
(*q*) Co. Litt. 147. b.
(*r*) Ibid.
(*s*) *Witherhead* v. *Harrison*, Sir Tho. Jo. 2.
(*t*) *Cooke* v. *Herle*, 2 Mod. 136.

CHAP. III. destroyed all privity of estate between himself and the tenant. (*u*)

Apportionment, &c. of a Rent Charge.

The right of Distress created upon the grant of a rent-charge, may however, like that for a rent-service, be affected by the apportionment, suspension, or extinction of the rent itself; although in general, a rent-charge could not be apportioned like a rent-service, because it was not aided by the statute of *Quia emptores Terrarum*. (*x*) So that, if a man having a rent-charge issuing out of land, purchase any parcel of the land, all the rent is extinct. (*y*) For a rent-charge being against common right, is construed strictly, and in general, held not to be apportionable by the act of the party. And therefore, upon such a purchase, it is necessary to have a new clause of Distress from the grantor of the rent, which is in effect the creation of a new rent. But although the grantee cannot sever any part of the land from the rent, without extinguishing the whole rent, yet he may by release extinguish a part of the rent itself. (*z*)

A rent-charge may in various cases be apportioned by act of law, where it cannot be apportioned by the act of the party. As, where a man had a rent-charge, and his father purchased part of the tenements charged in fee, and died; and the

(*u*) *Ognel's* Case, 4 Rep. 49. *Dixon* v. *Harrison*, Vaugh. 40.

(*x*) Ante, p. 41.

(*y*) Litt. Sect. 222.

(*z*) Co. Litt. 148. a.

part so purchased descended to the son who had the rent-charge; now this charge was apportioned according to the value of the land, as if it had been rent-service; because it came to the son by act of law. (*a*) So, if the father be grantee of a rent, and the son purchase part of the land charged, and by the death of the father the rent descend to the son, such rent shall be apportioned. And so it is, if the grantee assign the rent to the tenant of the land and a stranger jointly the rent is extinct, but for a moiety. (*b*)

In some cases, where by the act of the party, a rent-charge would be extinguished, yet, by the act of law, it will be saved not only from extinction, but be preserved entire from apportionment. As when a man grants a rent-charge out of two acres, and afterwards the grantee of the rent recovers one of the acres against the grantor by a title paramount; the whole rent will issue out of the other acre; but if it were a covinous recovery by a feigned title, the whole rent would be extinct, for then he would claim under the grantor. (*c*) And yet in some cases, a rent-charge is not wholly extinct, even where the grantee does claim under the grantor. As if B. lease one acre to A. for life, and A. being seised of another acre in fee, grants a rent-charge to B. out of both acres, and

(*a*) Litt. Sect. 224.
(*b*) Co. Litt. 149. b.
(*c*) Co. Litt. 148. b.

CHAP. III. commits waste in the acre which he holds for life, so that B. recovers from him that acre for the waste committed; the whole rent is not extinct, but shall be apportioned, although B. claims this acre under A. It being so held, in order to prevent the lessee from gaining the advantage of extinguishing rent by his own waste and forfeiture. (*d*)

In general, neither a rent-service nor a rent-charge can be partially suspended by the act of the party; but by the act of law, they may be suspended in part, and be *in esse* for the remainder. Thus where the tenant gave a part of the tenancy to the father of the lord in tail, and the father died and it descended to the lord; in this case, by the act of law the seigniory was suspended in part, and *in esse* for another part: by which means the rent-service, as incident to the seigniory, was in like manner suspended. And in the case of a rent-charge the law is the same. (*e*)

It is however perfectly clear, that by act of the party, the whole of a rent-charge may be for a time suspended, and afterwards revive. Thus, where a man seised of a rent-charge for life, took a lease of the land for five hundred years, and entered thereon; and afterwards, before the rent-charge was in arrear, surrendered the term to the lessor, and then distrained for the rent: it was

(*d*) Co. Litt. ibid. S. V. (*e*) Co. Litt. 148. b. Harg. note 147. ibid.

held, that by such surrender, the lease was absolutely gone and extinguished, as between the parties, and therefore that the rent revived: although it would have been otherwise as against those, who were not parties to the surrender. (*f*) CHAP III.

A rent-charge may be extinguished, not only by the act of the party, but by the act of God; for if the grantee of a rent-charge in fee die without heirs, the tenant will hold the land discharged of the rent, for it does not belong to any one by escheat. (*g*)

Seisin of a Rent-Charge, when necessary.

At the common law, the grantee of a rent-charge could have no remedy for it by Distress, or otherwise, until he had gained a seisin of the rent, sufficient to create a privity of estate between himself and the tenant: for which purpose, as I have already observed, attornment was formerly in all cases necessary, and is still requisite to be shewn, in cases of ancient rents, created before the statute 4 Anne, c. 16. (*h*) With respect to attornment on a rent-charge, it was held, that where persons seised of a rent-charge, by granting it over with attornment of the tenant, totally departed with their estate, and afterwards retook, either their former, or a different estate in the

(*f*) *Peto* v. *Pemberton*, Hardr. 496. Cro. Car. 101.
(*g*) *Attorney Gen.* v. *Sands*,
(*h*) See ante, p. 33.

CHAP. III.

rent, a new attornment was necessary; the former privity being absolutely destroyed. But, where attornment was once made to a man's estate in the rent, no new attornment was necessary, although his estate became afterwards enlarged or diminished. (*i*) Nor was it requisite to an estate executed by the statute of uses. (*k*)

Rent-Charge assignable.

A rent-charge being something immediately issuing out of the land, is not considered as a mere personal covenant for the payment of money: and therefore, where a rent-charge was granted to one and his assigns for his life, *pro consilio impendendo*, and it was afterwards assigned over, it was held that the assignee was entitled to distrain for the rent which became due after the assignment. (*l*)

But the arrears of the rent due at the time of the assignment cannot be assigned, for they are a mere chose in action: and it is said, that for such arrears, the assignor has no remedy at all against the tenant, after the assignment, if the tenant has attorned to the assignee; for thereby all privity between himself and the tenant is totally destroyed. (*m*) Such an assignment of the arrears is not however wholly void, for where in a replevin, the defendant avowed for *a rent-charge and arrears*

(*i*) Co. Litt. 309. b. *Long* v. *Buckeridge*, Stra. 108.

(*k*) *Dixon* v. *Harrison*, Vaugh. 44.

(*l*) *Maund's* Case, 7 Rep. 28. Co. Litt. 144. a.

(*m*) *Dixon* v. *Harrison*, Vaugh. 40.

thereof, assigned by a bargain and sale; and issue being taken on the assignment, the jury found, that they were so assigned. And thereupon verdict for the defendant. On its being moved in arrest of judgment, that the jury had found a void assignment, and therefore a repleader should be awarded, the court seemed to think, that the objection could not prevail after verdict. (*n*) CHAP. III.

A rent-charge is however so far considered to be in the nature of an annuity, that it is expressly included, in the 1st section of the annuity act, 17 Geo. 3. c. 26. And therefore rent-charges granted since that statute, are invalid if not inrolled in the manner therein prescribed, unless they fall within the exception contained in the 8th section of the act, namely, as being *A rent-charge given by will, or by marriage-settlement, or for the advancement of a child, or being secured upon lands of equal or greater annual value, whereof the grantor was seised in fee-simple or fee-tail in possession at the time of the grant, or secured by the actual transfer of stock, the dividends being of greater or equal annual value, or a voluntary annuity without pecuniary consideration, or being granted by a body-corporate, or under an Act of Parliament, or not exceeding ten pounds annually, unless there be more than one such annuity between the same parties.* This exception was held by Lord Thurlow to extend to an equitable, as well as to a legal Within the Annuity Act, 17 Geo. 3. c. 26.

(*n*) *Guilliams* v. *Munnington*. Sir Tho. Raym. 200.

estate in the land, and to all lands of equal or greater annual value than the rent-charge, notwithstanding they might be incumbered with other charges. (*o*) For it is to be construed liberally, and therefore although the statute speaks only of grantors seised in fee-simple or fee-tail in possession, yet in a case where a term for years was appointed to a trustee to secure a rent-charge, jointly by a father and son, the former being only tenant for life in possession, with an ultimate remainder in fee expectant on the determination of an estate tail, and the latter being tenant in tail in remainder; the court of King's Bench held such an appointment to be within the spirit of the exception, though not strictly within the letter of the statute. (*p*) So if the rent be charged both on freehold and leasehold lands, if the former be of equal or greater annual value than the rent-charge, it is equally within the exception of the act, as if it had been secured on such freehold lands alone. (*q*)

Coparceners.

Coparceners are entitled, of common right, to distrain for a rent assigned upon partition, (*r*) provided, it be reserved out of the lands descended: (*s*) and so may their grantees, for it is annexed to the estate. (*t*)

(*o*) *Shrapnel* v. *Vernon*, 2 Bro. Ch. Cas. 268.

(*p*) *Halsey* v. *Hales*, 7 T. R. 194.

(*q*) *Ex parte Michell, clerk*, 2 East, 137.

(*r*) Litt. Sect. 252, 253, and Harg. note (1) on Co. Litt. 153. a.

(*s*) Co. Litt. 169.

(*t*) *Butler* and *Baker's* Case, 3 Rep. 22. b.

Although coparceners, before partition, are considered in law but as one heir, (*u*) and therefore must join in making a Distress; (*x*) it is otherwise after partition; for then they may make several Distresses. So that even a rent-charge, although in its nature entire, and against common right, may be divided between coparceners, and by act of law, the tenant of the land is subject to several Distresses. (*y*) But if there be three coparceners, and they make partition, and one of them grant twenty shillings per annum out of her part, to her two sisters and their heirs for equality of partition, they shall have this rent in course of coparcenary, and shall join in an action for the same; (*z*) and as this rent is entire in its creation, it should seem, that they must join in a Distress. (*a*) So if two coparceners, by deed indented, alien both their parts to another in fee, rendering to them two and their heirs a rent out of the land, they are not joint-tenants of this rent, but shall have it in coparcenary, because their right in the land out of which the rent is reserved, was in coparcenary. (*b*)

One coparcener cannot be deprived of her rights by the tortious acts of another; and therefore, if there be coparceners of a seigniory, and one of

(*u*) Co. Litt. 163. b.
(*x*) *Stedman* v. *Page*, 5 Mod. 141. S. C. 1 Salk. 390.
(*y*) Co. Litt. 164. b.
(*z*) Id. 169. b.
(*a*) *Stukely* v. *Butler*, Hob. 172.
(*b*) Co. Litt. 169. b.

them disseize the tenant of the land, the other coparcener shall distrain for his moiety. (*c*) But if coparceners join together in an act, whereby they entirely depart with their coparcenary estate, as by levying a fine of the rent, even to the use of themselves, it should seem that their former estate is thereby so entirely destroyed, that they cannot afterwards distrain, for the arrears of the rent accrued before the fine levied. (*d*)

Although a rent assigned upon partition be in general distrainable of common right, yet partition may be so made, as to sever the rent from the right of Distress. Thus, where a lord had two daughters, and died, and upon partition fealty was allotted to the one, and a rent to the other, she had such rent as a rent-seck: (*e*) for here, the coparcener who had the rent, took no estate in the land out of which it issued, that being held solely of her who had the fealty, and from the fealty the Distress was inseparable. (*f*)

Where there is in one of the coparceners, a unity of seisin or possession in the rent and the land on which it is charged, there, for the benefit of the coparcener entitled to the rent, the law apportions

(*c*) Id. 148. b.

(*d*) Semble by the opinion of three Justices. Vaughan, Chief Justice contra. *Dixon* v. *Harrison*. Vaugh. Rep. 62.

(*e*) Co. Litt. 150. a.

(*f*) Id. 143. a. 151. b.

the rent by extinguishing only so much of it as is proportionate to her share in the land; but still the right of Distress is in some degree restrained. So that if a woman be seised of a rent-charge, and afterwards the lands charged, descend to her and her two sisters in coparcenary; only a third part of the rent is extinct by such unity of estate: but yet the coparcener who has the rent cannot distrain on the land, for the other two parts of the rent, until partition be made; because until that time, she is seised with her two sisters, *per my et per tout* in the land. (*g*) So if a man seised of four acres of land have issue, a son and a daughter by one venter, and two daughters by another venter, and grant a hundred shillings out of his land to his son in fee, and the son die without issue, in the life of his father; and on the death of the father, the land descend to the three daughters; the eldest daughter cannot distrain for the two parts of the rent, until partition be made. (*h*) CHAP. III.

Joint-tenants, like coparceners, hold by one title, and by one right, and are seised *per my et per tout*, of the rent or land. (*i*) And therefore, as every joint-tenant has an estate in every part of the rent, he may distrain alone for the whole, although he must afterwards avow jointly with his companions, and account to them for their respec- Joint-Tenants.

(*g*) Bro. Abr. Distr. pl. 38. 65.
(*h*) Id. Exting. pl. 31.
(*i*) Litt. Sect. 288.

tive shares of the rent. (*k*) And the survivor may distrain for the arrears accrued in the life of his deceased companion. (*l*)

Joint-tenants cannot in general by their own act divide their estate to the prejudice of others; (*m*) nor can they, by a tortious act, destroy each other's rights. And therefore, as in the case of coparceners, if two of them be seised of a seigniory, and one of them disseize the tenant of the land, the other may distrain for his moiety of the rent: (*n*) for this is construed to be a temporary severance of the joint-tenancy, and therefore a moiety only of the rent is suspended by the unity of possession. (*o*)

As in general, joint-tenants cannot destroy the rights which attach upon the land, (*p*) so they cannot charge the land to the prejudice of each other's estate therein. And therefore, if there be two joint-tenants in fee, and one grant a rent-charge by deed to a stranger, out of his part in the land, such rent-charge is effectual during the life of the grantor, but is void after his decease: and the survivor shall have the whole land discharged of the rent: (*q*) because the survivor

(*k*) *Pullen* v. *Palmer*, 3 Salk. 207. S. C. 5 Mod. 72. Carth. 328.

(*l*) 2 Rol. Abr. 86.

(*m*) Vin. Abr. Apport. B. 17.

(*n*) Co. Litt. 148. b.

(*o*) Id. 188. a.

(*p*) This rule has some exceptions. See *Lingen* v. *Payn*, Bridgm. 129. 2 Inst. 302.

(*q*) Litt. Sect. 286.

claims the land from the first feoffor, which is by a title paramount the grant of the rent-charge. But if there be two joint-tenants in fee, and one grant a rent-charge out of his part, and after release to his joint-tenant, and die, the survivor shall hold the land charged, because he claims under the release of his companion. (*r*) CHAP. III.

Upon the same principle, if there be two joint-tenants in fee, and one make a lease for years reserving a rent, and die, the surviving joint-tenant will have the reversion by survivorship, but shall not have the rent, because he claims the land by a title paramount the lease, namely, from the first feoffor, and therefore is a stranger to the rent. (*s*)

It is said, that if two joint-tenants make a lease for years by parol or deed poll, reserving a rent to one of them, this shall enure to them both; but if it be so reserved by deed indented, it shall enure to him alone, by way of estoppel. (*t*)

As joint-tenants are not permitted to charge each other's shares in the land, it is held, that if there be several joint-tenants, and one grant a rent-charge out of his land, the grantee may distrain the cattle of the grantor, but not those of the other joint-tenants; although, as it should seem,

(*r*) Co. Litt. 185. a.
(*s*) Ibid.
(*t*) Id. 47. a. 214. a.

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he may distrain the cattle of a stranger that come upon the land. (*u*)

But although joint-tenants cannot in general create charges on their cotenants shares in the land, yet they may sever the joint tenancy itself in various ways; as by the alienation of any freehold estate in the land, or by voluntary partition at the common law, or compulsory partition under the stat. 31 Hen. 8. c. 1. the effect of which acts is completely to destroy the joint-tenancy, and to create several estates in the tenants; but this cannot be effected by a devise in the will of a joint-tenant, for by his death, the survivorship accrues before the will can take effect. (*x*)

Tenants in Common.

Tenants in common do not, like joint-tenants, hold by one title and one right; but by different titles, and have several estates. And therefore, although they may join in personal actions, yet they cannot join in real actions, or such mixed actions as chiefly arise out of the realty. (*y*) So that, although they may join in a *Quare Impedit*, (*z*) and even in an action of debt against a lessee for rent, (*a*) yet if they distrain for it, as they must avow separately, it should seem that they must make several distresses. (*b*) For if

(*u*) Vin. Abr. Distr. I. 25, 26, 27.
(*x*) Litt. Sect. 287.
(*y*) Litt. Sect. 315. Co. Litt. 195. b.
(*z*) Co. Litt. 197. b.
(*a*) Litt. Sect. 316. *Midgley* v. *Lovelace*, Carth. 289.
(*b*) Litt. Sect. 317.

three tenants in common distrain thirty beasts, one of them must avow for ten, the other for ten, and the third for ten more. (*c*) But if the rent be of an entire thing, as to render a hawk or a horse, then they must of necessity join, the thing being incapable of division. (*d*) And therefore if two tenants in common in fee made a lease for life, rendering to them yearly a certain rent of ten shillings and a hawk, and they distrained, and the tenant made rescous: in this case, although they might have one assize for the hawk, yet they were compelled to have two assizes for the rent, because the whole rent followed the nature of the reversion, which was of several estates; and they were obliged to sever for that part of it which could be divided. (*e*) And therefore, as it should seem, the Distresses in this case, must also have been several, according to the nature of the reversion. CHAP. III.

Tenants in common are entitled to receive from the terre-tenant their several proportions of the rent: and therefore where a person holding under two tenants in common, paid the whole rent to one of them, after having received a notice to the contrary from the other, it was held, that the party who gave the notice might afterwards distrain upon the land for his share of the rent. (*f*)

(*c*) *Pullen* v. *Palmer*, 3 Salk. 207.
(*d*) Co. Litt. 197. a.
(*e*) Litt. Sect. 314.
(*f*) *Harrison* v. *Barnby*, 5 T. R. 246.

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As tenants in common have no original privity of estate between them, as to their respective shares, one may lease his part of the land to the other, rendering rent, for which a Distress may be made as if the land had been demised to a stranger. (*g*)

Distress by Husband and Wife.

It may be considered as a general rule, that in real actions for the lands of the wife, as on a disseisin, (*h*) or in an action of waste, (*i*) the husband and wife must join. In some personal actions they may join or sever at their election; but in general it is held, that in actions, personal or mixed, the wife should not be joined, unless she would have a right of action for the same cause, if she survived. (*k*) This rule may perhaps in general apply to the remedy of Distress, which ensues the nature of the distrainor's estate in the rent, or in the land out of which it issues. But whatever may be the nature or quantity of the estate, and whether vested in the wife in her own right, or *in auter droit*, in no case whatever can she distrain alone, or indeed bring any action without her husband's being joined. And therefore the only inquiry is, in what cases they may join in the Distress, or the husband distrain alone.

(*g*) Bro. Abr. Distr. pl. 65. *Hudson* v. *Snelgar*, 2 Rol. Rep. 212. *Snelgar*, v. *Henston*, Cro. Jac. 611.

(*h*) *Odill* v. *Tirrel*, 1 Bulstr. 21.

(*i*) *Thetford* v. *Thetford*, Saville. 111.

(*k*) *Staunton* v. *Hobart*, 1 Sid. 224.

We have already seen, that with regard to distrainable rents, except that of a rent-charge, the Distress was, at common law, incident to the reversion. And as in all cases, where the wife has an estate of freehold only, or of freehold and inheritance, the immediate reversion of lands in lease is not in the husband alone, but in the husband and wife, in right of the wife, it should seem that when a Distress is made in respect of such a reversion, the Distress may be joint, as ensuing the nature of their estate therein; whether the rent accrued before, or after the coverture. Thus it has been said, that if a woman be endowed of a manor, and marry, and the rent be in arrear, the husband and wife should avow jointly for the rent accrued, both before and after the coverture. (*l*) But where the reversion is a chattel real, as if a woman be possessed of a term for twenty years, and before coverture lease for ten years, the husband may, during the coverture, vest this chattel in himself, by reducing it into possession, and in that case should of course distrain for the rent alone. And indeed, in a variety of cases, not only where the reversion has been a chattel interest, but even where it has been of an estate of freehold and inheritance in the wife, the courts have considered the rent itself to be so much in the nature of a personal chattel belonging to the husband, (*m*) as to hold, that the husband

(*l*) Bro. Avowry, pl. 70. Bulstr. 233. S. C. 1 Rol. R. 52. East. 565.

(*m*) *North* v. *Wyard*, 2

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may not only distrain, but even avow for it alone. (*n*) So that it may perhaps be laid down as a general rule, that for all rent due in right of the wife, the husband may distrain alone, (*o*) even if it accrue to her *in auter droit* as executrix or administratrix. (*p*)

With respect to the remedies for the recovery of *the arrears* of a rent accruing in right of the wife, a distinction must be made, between rent due for land, on which the wife has only a chattel interest; and rent due on land, in which she has an estate of freehold, or of freehold and inheritance. And in some cases, a further distinction must be made, between rent accruing before, and rent accruing after the coverture.

Rent on a Chattel Interest of the Wife.

First, with respect to rent due for land, in which the wife has only a chattel interest, it should seem, that the husband may at any time, during the coverture, distrain for the arrears due before or after the marriage. And if he survive, as the whole chattel will then vest absolutely in him by survivorship, without his doing any act to reduce it into possession, it seems to be perfectly clear, that he may, after the death of the wife, distrain for all

(*n*) *Bowles* v. *Poore*, Cro. Jac. 282. *Wise* v. *Bellent*. Id. 442. *Osborne* v. *Walleeden*, 1 Mod. 273. *Pullen* v. *Palmer*, 3 Salk. 207.

(*o*) *Osborne* v. *Wickenden*, 2 Saund. 195. and the cases last cited.

(*p*) See *Yard* v. *Eland*, Ld. Raym. 369. *Wankford* v. *Wankford*, 1 Salk. 306. *Ankerstein* v. *Clark*, 4 T. R. 617.

the arrears, whether due before or after the marriage. (*q*) But if the husband die without reducing a chattel real of his wife into possession, it survives to her, and the arrears of rent, whether accrued before, or during the coverture, do not belong to the executors of the husband, but go, with the reversion, to the wife surviving, and may be distrained for by her accordingly. (*r*)

But if any act be done by the husband in his life-time, to reduce into possession the chattel real of the wife, her future interest in the rent depends wholly upon the nature of such act of reduction; which may be either partial, or total; for a disposition of part of a term, is not a reducing into possession of the whole: so that if a man be possessed of a term of forty years, in right of his wife, and make a lease for twenty years reserving a rent, and die, the wife will take the residue of the term, but the executors of the husband will have the rent; for in this case, it is not incident to her reversion, but a special reservation by lease, to which the wife was a stranger. (*s*)

Rent on a Freehold Interest of the Wife.

With respect to the arrears of rent accruing on land, in which the wife has a freehold interest,

(*q*) See Co. Litt. 46. b. 300. a. 351. a.

(*r*) Acc. Co. Litt. 351. a. 1 Roll. Abr. 350. Contra. *Anonymous*. *Moore's* Rep. 7.

But this last case does not seem to be law.

(*s*) *Blaxton* v. *Heath*, Poph. 145. Co. Litt. 46. b.

CHAP. III. there was an important distinction at the common law, as to their accruing before, or after the coverture. For if they accrued before it, the husband surviving was not entitled to them, but they belonged to the personal representatives of the wife, who might have sued for them in an action of debt. (*t*) If they accrued during the coverture, and the husband survived, then it was held, that they belonged to him, and that he might bring debt for their recovery: but if the wife survived, then such arrears belonged to her, and did not go to the executors of the husband. (*u*)

These rights of the husband were however materially altered by the statute 32 H. 8. c. 37, by the 3d section of which it is provided, "That if any man have, in right of his wife, any estate in fee-simple, fee-tail, or for term of life, in any rents or fee-farms, and the same be unpaid in the wife's life, then the husband, after the death of his wife, or his executors or administrators, may have an action of debt against the tenant in demesne, or his executors or administrators, and also that the husband after the death of the wife, may distrain for the said arrears, in like manner as he might have done, if his wife had been living."

The effect of this statute, is therefore to give to

(*t*) *Ognel's* Case, 4 Rep. 51. a. Co. Litt. 162. b.

(*u*) Ibid, and Co. Litt. 351. a.

the husband the remedy of an action of debt, or a Distress, for the arrears accrued before the coverture, for which he had before no remedy at all; and to give him the additional remedy of a Distress, for the arrears accrued during the coverture, for which, at the common law, he could have only an action of debt. (*x*) The remedy of Distress given by this statute being confined to the husband alone, but the action of debt for the rent, being extended to his executors and administrators.

With regard to leases made jointly by the husband and wife, although they may not be made conformably to the formalities prescribed by the statutes of Hen. 8. so as to bind the wife and her heirs, yet as they seem to be voidable only by the entry of the wife, or those who claim under her, (*y*) they are good until they be so avoided, and the husband's right of Distress for the rent reserved, is therefore the same as belongs to leases made by the wife alone before her coverture; for the Distress must, in each case, be made in respect of the reversion, in right of the wife.

(*x*) *Ognel*'s Case, 4 Rep. 51. a. This proposition is perhaps not true to its fullest extent, as by the operation of a preceding statute, 21 Hen. 8. the husband was entitled to administration of his wife's effects, and was thereby enabled to acquire an interest in arrears of rent accrued, even before the coverture.

(*y*) *Smallman* v. *Agborow*, Cro. Jac 417. *Cromwell*'s Case, 2 Rep. 77. b. *Jordan* v. *Wikes*, Cro. Jac. 332.

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Distress by Tenant by the Curtesy.

The chattels real of the wife, as I have already observed, do on her death survive to the husband, and vest absolutely in him: but he has no estate after her death, in her lands of inheritance, unless he can take them as tenant by the curtesy. In those lands which he does take by the curtesy, he has an estate of freehold, and therefore, in contemplation of law, a reversion on all lands of the wife leased for years or lives, and in respect of such reversion, may distrain, *at common law*, for all rents reserved thereon. So a man may be tenant by the curtesy of a rent, in which his wife has an estate of inheritance; and as his estate therein is like his curtesy in lands, a freehold interest, he may, in all cases, distrain for such rent, *at common law*, if it were granted or reserved with a clause of Distress; and if there be no clause of Distress, he may distrain for it as *a rent-seck*, under the operation of the statute 4 Geo. 2. c. 28.

Distress by Tenant in Dower, or by Free Bench.

A woman may be endowed of a rent, as well as of land; whether it be rent-service, rent-charge, or rent-seek; although not of an annuity, because that only charges the person, and is not issuing out of lands or tenements. (*z*) Thus if a husband, tenant in fee, make a lease for years reserving rent, and die, his wife shall be endowed of the third part of the reversion by metes and bounds, together with a third part of the rent. (*a*) For the rent is

(*z*) Co. Litt. 32. a. (*a*) Ibid.

here apportioned by act of law. And therefore, if a widow be endowed of the third part of a rent-service in fee, she may distrain for the third part thereof; as if the tenant hold by a rent of three pounds, she shall distrain for twenty shillings, and the heir shall distrain for the other two parts of the rent. (*b*) So where a woman who had a rent-charge, married with the terre-tenant, who died, and then she distrained for the rent, and afterwards was endowed of the same land, it seems to have been held, that the rent should be apportioned according to its value. (*c*)

At the common law, if a widow were endowed of a rent, although she had not the reversion, she might distrain of common right. (*d*) And therefore, where the husband held of a lord by homage, fealty and ten shillings rent, and the lord died, it was determined that his widow should have the third part of the rent, which was of the nature of rent-seck, but yet that she might distrain for it *in favorem Dotis.* (*e*)

The time in which a tenant in dower is entitled to distrain for rent of which she is endowed, does in some cases depend upon the nature of the dower itself. For when she is endowed of a thing certain, as in the dower *ad ostium Ecclesiæ*, or *ex*

(*b*) Bro. Avowry, pl. 139.
(*c*) Id. Apport. pl. 20.
(*d*) Co. Litt. 169. b.
(*e*) *Anonymous*, Keilw. 104.

CHAP. III. *assensu patris*, she may enter immediately on the death of her husband, without assignment. (*f*) And where the tenant in dower by her writ demanded land or rent in certain, she might, even at common law, after judgment distrain, before seisin delivered to her by the sheriff on the *habere facias seisinam*. But where the thing is not demanded in certainty by the writ, as where the writ is in respect of a rent-charge of six pounds, and she has judgment to recover the third part, although it be certain that she shall have forty shillings, yet she cannot distrain for them, until delivery by the sheriff. And so, if the wife of one tenant in common demand the third part of a moiety, yet after judgment she cannot enter, and consequently cannot distrain, until it be delivered to her by the sheriff, although such delivery do not reduce it to more certainty than it was before. (*g*)

Tenant in dower holds as in dower, all lands assigned to her by the heir, in respect of dower, although she were not strictly dowable of them. And in like manner she is entitled to hold lands of the husband taken by her from the heir, in exchange for her dower; (*h*) and consequently, may distrain in such lands of common right.

Tenant by Free Bench.

As a woman may be entitled to a rent as part of her dower at the common law, so she may

(*f*) Litt. Sect. 39.
(*g*) Co. Litt. 34. b.
(*h*) Ibid. Hal. MSS. not. (9).

have it as her *free bench* by custom, out of copyhold tenure. And therefore when a copyholder in fee (there being a custom for a widow's estate) made a lease by licence, reserving rent to him and his wife during their lives, and to his heirs; it was resolved, that the wife should have the rent after her husband's death: and therefore, as it should seem, distrain for it, like other copyhold rents. (*i*)

Distress by Tenant in Tail.

By the stat. 32 Hy. 8. c. 28. tenants in tail are entitled to make leases not exceeding three lives, or twenty-one years, under certain restrictions prescribed by the act, and such leases are good against the issue in tail, although not against those in remainder. But if a tenant in tail make a lease, not in conformity to that statute, it will be good as against himself, although subject to be avoided, after his death, by the issue in tail. And therefore, such tenant in tail has a reversion on all leases, whether made in conformity to the statute, or otherwise. And consequently may distrain, even at common law, for the rent reserved thereon.

Distress by Tenants for life, &c.

Tenants, for their own lives, or *per autre vie*, or tenants in tail after possibility of issue extinct, have estates of freehold. And therefore, if they make a lease for years, or for the lives of others, reserving rent, they are entitled at the common

(*i*) *Sacheverell* v. *Frogate*, *Humphrey*, Cro. Eliz. 524. 1 Ventr. 163. *Laugher* v. Com. Dig. Rent B. 5.

CHAP. III. law to distrain upon their lessee, in respect of the reversion, which in contemplation of law belongs to their respective estates. But if they make a grant which amounts to a disposition of their whole estate, reserving rent, they cannot of course distrain at common law for want of a reversion, unless a power of Distress be especially reserved; but by the stat. 4 Geo. 2. c. 28, such rent is now distrainable as a rent-seck.

It may here be proper to remark, that at the common law, if tenant for life made a lease for years, if he should so long live, at a certain rent payable quarterly, and died before a quarter day, the tenant was discharged of that quarter's rent by the act of God, (*k*) for no one was entitled to recover it; and the same was the case if any one having a determinable estate on which the lease depended, died only a day before the rent reserved became due: (*l*) but this is remedied by the 15th section of the stat. 11 Geo. 2. c. 19, which gives an action on the case for the recovery of this proportion of rent, to the executors and administrators of the tenant for life dying before the day, on which the rent becomes payable.

Distress by Tenant by Elegit. Tenant by *elegit*, who comes in by act of law, and in contemplation of law has only a chattel in-

(*k*) *Clun's* Case, 10 Rep. 128.

(*l*) Per Ld. Hardw. in *Paget* v. *Gee*, ap. 1 Burn Just. 484. Ambl. 198.

terest, is yet considered to have so far an estate in the rent of land taken in execution, as enables him to distrain; although, from the nature of his estate, he can have only an uncertain interest in the reversion. (*m*) And where it is necessary to give effect to the writ, the law will apportion the rent; for if a man lease for years reserving rent, and afterwards one moiety of the reversion be taken in execution upon an elegit, the tenant by elegit will be entitled to one moiety of the rent; (*n*) for although the tenant of the land cannot be made liable to two Distresses by the act of the party, yet he may by the act of law. (*o*) But a tenant by elegit is not within the stat. 32 Hy. 8. c. 37, giving to the executors, &c. of a tenant for life, a Distress for the arrears of rent accrued in his lifetime. And therefore, where there was judgment against the tenant for life of a rent-charge, and a moiety of the rent was taken in execution under an elegit, and more rent being in arrear, the tenant for life died, it was held, that the tenant by elegit could not distrain for the arrears accrued before the tenants for life's decease, he not being named in the statute, nor coming in under the party, but by act of law. (*p*)

The conusee of a statute merchant, or statute

Distress by Conusee of a Statute.

(*m*) Bro. Distr. pl. 72. *Pool* v. *Neel*, 2 Sid. 29.

(*n*) Vin. Abr. Apport. D. 4.

(*o*) *Wotton* v. *Shirt*, Cro. Eliz 742.

(*p*) *Pool* v. *Neel*, 2 Sid. 28, 62. *Buller* N. P. 57.

CHAP. III.

staple, has also such an interest in the land as enables him to distrain: for indeed an entry under an execution by statute, creates a sort of freehold in the land, being an interest of uncertain duration. And the effect of it is to turn the estate of the conusor into a reversion. (*q*) So that after such entry, the conusee is capable of taking a release of the reversion itself, or of surrendering to the reversioner. (*r*)

If therefore a lease for years be made reserving rent, and then the lessor acknowledge a statute, which is extended, the conusee, after the extent, may distrain for the rent; (*s*) although it seems, that if there be already an arrear of rent, and the lessor acknowledge a statute as to such arrear, and then the conusee enters, he cannot make a Distress for the arrear of rent already incurred. (*t*)

Executors and Administrators.

At the common law, neither the heirs, nor the executors or administrators of persons seised either in fee-simple, fee-tail, or for life, of a rent-service, rent-charge, rent-seck, or fee farm, had any remedies for recovering the arrears of rent, incurred in the life of the owner of such rents. (*u*) But by the stat. 32 Hy. 8. c. 37, reciting that, Forasmuch as by the order of the common law, the executors

(*q*) *Dighton* v. *Greenvil*, 2 Vent. 327. *Corbet*'s Case, 4 Rep. 82.

(*r*) Co. Litt. 270 b.

(*s*) *Dighton* v. *Greenvil*, ut supra.

(*t*) Ibid.

(*u*) Co. Litt. 162. a.

or administrators of tenants in fee-simple, tenants in fee-tail, or tenants for term of life, of rent-services, rent-charges, rent-seck, and fee farms, had no remedy to recover such arrearages of the rents or fee farms, as were due unto their testators in their lives; nor yet the heirs of such testator, nor any person having the reversion of his estate after his decease, could distrain, or have any lawful action to levy any such arrearages of rents, or fee farms due unto him in his life as aforesaid: it is by the first section provided, that the executors and administrators of every such persons, to whom any such rent or fee farm shall be due at the time of their deaths, may distrain upon the land charged with the rent, and chargeable to the Distress of the testator, in like manner as the testator himself might have done, so long as the lands remain in the possession of the tenant in demesne who ought to have paid the rent or fee farm, or of any other person claiming by and from him, by purchase, gift, or descent.

The second section of the statute exempts from its operation, lands in Wales, the tenants of which had been accustomed to pay a sum of money to the lord, for redemption of the arrears.

And the fourth section enables tenants *per autre vie*, and their executors and administrators to distrain for the arrears due at the death of the *Cestui que vie*, upon the lands and tenements out of which

CHAP. III. the rents or fee farms issue, in the same manner as might have been done, during the life of the *Cestui que vie* himself.

Upon this statute, Lord Coke says, That the preamble concerning the executors or administrators of tenant for life, is to be understood only of tenants *per autre vie*; (*x*) but it has been since determined, that the statute extends to all tenants for life. (*y*) It should however be observed, that it comprises only persons strictly claiming under the deceased tenants. And therefore where a moiety of the rent was taken in execution under an elegit, and the tenant for life died, it was held that the tenant by elegit could not distrain for the arrears due at his death; because he was not named in the statute, and did not in strictness come in under the tenant for life, nor by his act, but by act of law. (*z*)

The arrears to be distrained for under this statute, must be such as were chargeable to the Distress of the testator at the time of his death. So that if one be seised of a rent, and he grant over such rent being in arrear, and the tenant attorns, the Distress for such arrears is gone. (*a*) And so if the lord grant away his seigniory, and die, his execu-

(*x*) Co. Litt. 162. a. S. V. Harg. note (4) ibid.

(*y*) *Hool* v. *Bell*, Ld. Raym. 172.

(*z*) *Pool* v. *Neel*, 2 Sid. 28, 62.

(*a*) *Ognel*'s Case, 4 Rep. 50, 51. *Dixon* v. *Harrison*, Vaugh. 40.

tors shall have no Distress for the arrears. (*b*) Neither does the statute extend to the arrear of a *nomine pœnæ*, or for relief, or aid. (*c*) CHAP. III.

It however comprises the arrears of all kinds of rent, except corporal services, issuing out of a freehold or inheritance, whether they be in money, corn, cattle, or any other profit to be delivered or yielded; and whether they be annual, or payable every two, three or four years; (*d*) but such rents must be issuing out of freehold lands, and therefore the statute does not extend to copyhold rents, nor does it extend even to free-rents, unless there be a privity between the lord and the tenant, as by attornment. (*e*)

By the words of the statute, the Distress must be made on the lands whilst in the possession of the "tenant in demesne," or some person claiming under him, by purchase, gift, or descent; and therefore it extends to the possession of those persons only, who claim under the tenant, and does not comprise the lord claiming by escheat, tenant in dower, or by the curtesy, for they come in, not under the party, but by act of law. (*f*) This clause has not however received the strictest construction; for where A. being seised of a reversion

(*b*) Co. Litt, 162. b.
(*c*) Ibid.
(*d*) Ibid.
(*e*) *Appleton* v. *Doily*, Yelv. 135. S. V. *Cordell* and *Cliffton*'s Case, 2 Leon. 152. and Gilb. Ten. 186.
(*f*) *Anonymous*, 418. 1 Leon. 302.

CHAP. III. in fee after the determination of an existing lease for years, granted a rent-charge in fee, and after the expiration of the lease, infeoffed B. in fee; and then the grantee made his executors and died, and B. made a lease at will: the executors of the grantee having distrained upon the lessee at will for the arrears due in the lifetime of the grantee, and before the expiration of the lease for years; it was agreed, that the arrears were lost at the common law, but it was at the same time determined, that although the lessee at will claimed immediately under the feoffee, and not under the tenant in demesne, (who in this case was the grantor) yet that the remedy having been destroyed by the act of God, namely, by the death of the grantee, the statute should be liberally expounded as a remedial law, and the lessee at will be considered as holding *under* the grantor, because he in effect held *from him*, and as such, that he should be charged with the arrears by the statute. (*g*) So, if the tenant in fee make a gift in tail, and the donee die, the issue in tail is within the statute, for he claims, *only under the title and estate* of the tenant in demesne, although he does not claim only by descent, but *per formam Doni*. So if there be tenant in tail, with the remainder over in fee, the issue in tail is within the statute. (*h*) And where A. granted a rent-charge to B., and the rent being in arrear, B.

(*g*) *Ognel's* Case, 4 Rep. 48. b. (*h*) Id. 50. b.

died, and then A. enfeoffed C. in fee, who many years afterwards enfeoffed D., who enfeoffed E., it was held by the opinion of three Justices, that E. should be chargeable with the arrears to the executors of B. (*i*) But neither the remainder-man, nor the reversioner can be said, in any manner, to claim under the tenant for life, or in tail. And therefore, if the tenant in demesne make a lease for life, the remainder for life, the remainder in fee, and the tenant for life, do not pay the rent due to his lord, and then the lord die, and the tenant for life dies, the executors cannot distrain upon him in remainder, because he does not claim, *by or from* the tenant for life. And so it is in the case of a reversioner. (*k*)

It is otherwise, however, with respect of estates *per autre vie*, for if a man grant a rent-charge to A. for the life of B., and make a lease to C. for life, remainder to D. in fee, and the rent be in arrear, and then B. die, and afterwards C. dies also; A. may distrain D. in remainder for all the arrears. And this difference arises from the diversity of the 1st and 4th sections of the statute; the latter in the case of an estate *per autre vie*, giving a Distress generally, on the lands themselves, out of which the rent issues; without the restriction continued in the first section; which applies to all

(*i*) *Anonymous*, 1 Leon 203. 302. Case 418. S. C. Id. 3. (*k*) Co. Litt. 162. b.

other estates, and confines the Distress to the possession of the tenant, from whom the rent is due, or the possession of persons claiming, by and from such tenant by purchase, gift, or descent. (*l*)

It has been doubted, whether a rent-charge granted for years, or a lease for years on which rent is reserved, be within this statute. And therefore, where one granted to another a rent-charge for ninety-nine years if he should so long live, and the grantee died, and his executors distrained for the arrears; the court held the case not to be within the statute; because the executors of the grantee were not without a remedy at the common law, inasmuch as they might have an action of debt for the rent. (*m*) But this is a very unsatisfactory reason; for it is expressly the opinion of Lord Coke, that the statute does give further remedy, in some cases, where there was a remedy at the common law. (*n*) There is however, a much better reason for this decision, namely, that terms for years are not mentioned in the statute; and therefore Lord Coke says, If a man make a lease for life or lives, or a gift in tail reserving a rent, this is a rent-service within the statute; (*o*) "from "whence it may be inferred," says Mr. Justice Buller, (*p*) "that he thought a rent reserved upon

(*l*) Ibid. and *Edrich's* Case, 5 Rep. 118.

(*m*) *Turner* v. *Lee*, Cro. Car. 471.

(*n*) Co. Litt. 162. a.

(*o*) Co. Litt. 162. b.

(*p*) Bull. Ni. Pri. 57.

"a lease for years was not within it; and I appre-
"hend that it is not; for the landlord is not tenant
"in fee, fee-tail, or for life of such a rent; and it
"is the executors of such only, who are mentioned
"in the act. However in trespass, where it ap-
"peared that the defendant had distrained the
"plaintiff's goods, for rent due to his testator upon
"a lease for years, Lord Chief Justice Lee held it
"to be within the statute, and the defendant ob-
"tained a verdict." But this decision at *Nisi Prius* can hardly be sufficient to weigh against the authorities that oppose it.

In all cases therefore, where the testator or intestate was seised of a rent of any kind, either in fee-simple, fee-tail, or for life, his executors or administrators may distrain for the arrears incurred in his life-time, under the operation of this statute. But as, in all cases, where the testator dies seised of an estate of inheritance, which descends to his heir, such heir is of course entitled to the rent, accruing at any time after the decease of the ancestor; it has, in some cases, become a question of great nicety, to determine whether a certain portion of the rent did accrue before, or after that event. Thus Lord Hale says, if a man seised in fee make a lease for years rendering rent, and on the day on which it is payable, he dies after sunset, but before midnight, his heir shall have this rent, and not his executors; because the rent is

not due until the last minute of the natural day.(*q*) But a distinction has been taken, between a lease made by a tenant in fee or under a power, and one made by a bare tenant for life, it being held in the latter case, that if the lessor lived to the beginning of the rent-day, that was sufficient to give the rent to the executor, rather than that it should be lost; (*r*) but this case, as I have before stated, is now provided against by the stat. 11 Geo. 2. c. 19. s. 15, which gives to the executors or administrators of such tenant for life, dying on the rent day, the whole of the rent reserved, and if dying before it, a proportionate part.

Rents in which the testator or intestate had an estate of freehold, or of freehold and inheritance, are therefore within the statute of Hen. 8.; but for arrears incurred in his lifetime, on a lease for years, no Distress can be made by his executors or administrators, otherwise than at common law. Now at the common law there does not seem to be any case, in which executors or administrators can distrain for the arrears, due in the life of their deceased testator or intestate, unless the term, with the reversion thereon, vest in them in their representative characters. As if lessee for fifty years, lease for twenty years, reserving rent, and die during the latter term; here the term will vest in his

(*q*) *Duppa* v. *Mayo*, 1 Saund. 287.

(*r*) Wm.'s note (17) ibid.

executors, with the reversion for the residue of the fifty years; and therefore, in respect of that reversion, they may distrain for the arrears at the common law, and as it should seem, may even distrain for them, as in their own right;(*s*) but if the testator by his will specifically bequeath his reversionary interest in the term, it is necessary that his executor should distrain for the arrears, before his assent to the legacy; as the reversion will thereby be vested in the legatee;(*t*) and being thus divested out of the executor, by his own assent, it should seem, that he can no longer distrain for the arrears incurred in his testator's lifetime; although he may have an action on the contract against the lessee.(*u*) CHAP. III.

Where a term for years vests in executors or administrators, they may of course distrain for the rent accruing in their own time, as if they were entitled to it in their own right.

The same principle applies to the right of Distress by an heir, whether he be heir of tenant in fee-simple, or fee-tail; or whether he take by de- Heirs.

(*s*) *Wade* v. *Marsh*, Latch. Rep. 211.

(*t*) See post, p. 89.

(*u*) It may perhaps be thought, that such arrears, although separated from the reversion, are distrainable as a rent-seck within the 5th sect. of 4 Geo. 2. c. 28: but there seems to be great difficulty in contending, that the statute can operate upon part of a rent as a rent-seck, whilst the remainder continues to be a rent-service.

CHAP III.

scent at the common law, or by custom; namely, that the Distress shall follow the nature of the estate in the land or rent. For if the rent be not specifically reserved, the law will distribute it according to the estate. And if the reservation be bad, the law, in general, will not suffer it to destroy the rent, but carry it along with the estate, to him to whom the reservation should have been made. However, although it will sometimes supply a defective, or correct an erroneous reservation, it will not aid an uncertain one, even in favour of an heir. And therefore, if a man reserve a rent to him *or* his heirs, the rent is good for the term of his life, but void as to his heirs. (*x*) So the law will not cure a reservation *specifically* bad; as where, in a case already cited, tenant in fee-simple, together with his son and heir apparent, made a lease for years, to commence after the father's death, reserving the rent to the son by his proper name, but not reserving it to the heirs of the lessor, it was held that the son could not take the rent at all; for it could not be reserved to him as a stranger, and it was not reserved to the heirs of the lessor. (*y*) It has also been said, that if a man make a lease for life, reserving rent to him and his executors, neither the executor, nor the heir shall have the rent. (*z*) But this may well be

(*x*) Co Litt. 214. a.

(*y*) *Oates* v. *Frith*, Hob. 130. *Cother* v. *Merrick*, Hard. 95.

(*z*) 1 Brownl. and Goldesb. 30. *Richmond* v. *Butcher*, Cro. Eliz. 217.

doubted, for if lessee for hundred years, let for fifty, reserving rent to him and his heirs, *during the term*, it seems that the rent will go to the executor; (*a*) for in this case, to permit it to follow the reservation, would be to contradict the law, and to suffer it to be destroyed, would be to defeat the evident intention of the parties. Where a reservation is specific, although it may be defective, yet if agreeable to law, it will not be extended in favour of an heir. And therefore, when a man seised of two acres, let one reserving rent to himself, and the other reserving rent to him and his heirs, it was held that the first reservation should determine with his life: the difference of the two reservations strongly implying an intention to exclude the heir from one of the rents. (*b*) On the other hand, the heir will be entitled to a rent, although not named in the reservation, if he be named in the clause of Distress. (*c*)

The true principle of determining, in what cases the heir shall have the rent, seems to be, to consider the nature of the estate descending upon him, either in the rent, or in the land out of which it is reserved. And therefore if a tenant in tail make a lease, and reserve the rent generally to his heirs, it will go with the reversion to the heirs in tail. Thus where tenant in tail male had issue two sons

(*a*) *Sacheverell* v. *Frogate*, 1 Ventr. 162.
(*b*) Ibid.
(*c*) Co. Litt. 148. a. n. (1) and *Stafford's* Case, Dyer 252.

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by different venters, and died, and the eldest son entered, and made a lease for twenty-one years reserving rent generally to him his heirs and assigns, and died without issue, leaving two sisters his heirs at law; it was held, that the rent should go, along with the reversion, to the brother of the half blood, who was heir to the entail and reversion, although not heir to the lessor. (*d*) And so in a customary estate, as of gavelkind tenure, if the rent be reserved generally, it will go to the customary heir, and in an estate descending *ex parte materna*, it will go to the heir on the part of the mother. (*e*) Or if a man seised in fee, make a lease for years reserving rent to himself, his executors and administrators, and die, during the continuance of the lease, this rent, notwithstanding the express reservation, cannot go to the executors, but will descend with the fee to his heir. (*f*)

When the heir is entitled to a rent, he is also entitled to all its incidents, and therefore a *nomine pœnæ* to secure the rent, will likewise descend to him. (*g*) But the heirs's right of Distress does not extend to the arrears of rent accrued in the life of the ancestor, for such arrears belong to the personal representatives of the ancestor, and not

(*d*) *Cother* v. *Merrick*, Hardr. 91.

(*e*) Id. 90, 95. *Randall* v. *Jenkins*, 1 Mod. Rep. 110.

(*f*) *Sacheverell* v. *Frogate*, 1 Ventr. 161.

(*g*) Co. Litt. 162. b. *Bendloss* v. *Phillips*, Cro. Eliz. 895.

to his heir. But, as we have before seen, he is entitled to all rent accruing, even but an hour after his ancestor's decease. (*h*) And if rent be reserved payable at either of two periods, at the election of the lessee, and the lessor die between them, the rent being unpaid, it will go to the heir. (*i*)

Devisees and Legatees.

Devisees, like heirs, may distrain in respect of their reversionary estate; for by a devise of the reversion, the rent will pass as its incident. (*k*) And even at the common law, before the statute of wills, (*l*) it was held, that devisees by custom might distrain for rent, without the attornment of the tenant to give them seisin, because the will of the testator might otherwise have been defeated. (*m*)

Like persons taking by descent, devisees were entitled to the benefit of an apportionment of the rent. So that if a tenant by knight's service had, after the statute of wills, devised the reversion of two parts of the land, the devisee would have had two parts of the rent. (*n*) It is also held, that a rent may be devised, or bequeathed, although it be suspended by the testator's uniting the possession of the rent, and the

(*h*) See ante, p. 81.
(*i*) *Clun*'s Case, 10 Rep. 128. b.
(*k*) *Sacheverell* v. *Frogate*, 1 Ventr. 161.
(*l*) 32 Hy. 8. c. 1.
(*m*) Litt. Sect. 585, 586.
(*n*) Co. Litt. 148. a.

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land,(*o*) provided it be not extinguished.(*p*) In all cases therefore, where there is a unity of possession in the rent, and the land out of which it issues, it becomes a question, whether by means of it, the rent be extinguished, or only suspended. And in the bequest of a chattel, this question may arise, not only with respect to a unity of possession in the testator, but even in his executor. As to which, in a case where a man by his will bequeathed to his wife a term of years, for so long time as she should continue unmarried, and after her marriage, a rent payable out of the same lands, and made her his executrix: although the whole term vested in her as executrix, yet it was held, that it did not extinguish the rent by unity of possession. (*q*)

It was formerly doubted, whether a rent-charge *per autre vie* were deviseable within the statute of wills; but it has been decided that it is so; and that the devisee may distrain for it, within the stat. 32 Hen. 8. c. 37. (*r*)

Where a rent alone was devised without any estate in the land, it seems formerly to have been necessary for the devisor to give a power of Dis-

(*o*) *Cader* v. *Oliver*'s Case, 3 Leon. 154.

(*p*) *Anonym.* 2 An. 194. *Stafford*'s Case, Dyer, 253. *Long* v. *Buckeridge*, Stra. 106.

(*q*) *Gouge* v. *Hayward*, Bridgm. Rep. 54. S.C. 1 Roll. Abr. 610.

(*r*) See *Pool* v. *Neel*, 2 Sid. 62.

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tress, that is in effect to make it a rent-charge, in order to entitle the devisee to distrain: (*s*) but this cannot now be necessary, as a rent devised out *of a freehold*, must be considered as a rent-seck, to which the stat. 4 Geo. 2. c. 28. s. 5. has extended the right of Distress. (*t*)

There is however one considerable difference between the devise of a freehold estate or rent, and the bequest of a chattel interest; for the devise vests absolutely by the testator's will, but the interest of the legatee must await the executor's assent to the bequest. And therefore, before such assent, the interest remains in the executor, and consequently the legatee cannot distrain. (*u*)

This assent may be either express or implied; but it must relate to the particular subject of the legacy. So that if one bequeath a rent to A., and the land to B., the executor's assent that A. shall have the rent, is no assent that B. shall have the land, because the rent and the land are distinct legacies: (*x*) but his assent to the bequest of the land, seems to imply his assent to the bequest of the rent; for when the land is gone, it is indifferent to the testator's estate, whether it be charged with the rent or not. (*y*)

(*s*) *Gouge* v. *Hayward*, Bridgm. 52.

(*t*) Vide post, p. 101.

(*u*) *Toller*'s Law of Executors, 239, 240.

(*x*) Toller 242.

(*y*) Id. 243.

The executor's assent may be either absolute or conditional; and where it is conditional, the legatee's interest in the request, must of course be subject to the condition imposed. (z)

Trustees, Assignees, Guardians, Committees, and Receivers.

Persons who have vested in them legal estates, though in trust for others, as the trustees of a feme covert, or the assignees of a bankrupt, may of course distrain for rent, in respect of such legal estates, in the same manner as if they were beneficially interested therein. There are however some other persons, of a nearly similar description, whom it may be proper to mention more particularly; namely, guardians, committees of lunatics, and receivers appointed by the court of chancery.

Guardians.

In our ancient law, the rights of guardian, especially in chivalry, formed a very important topic of inquiry. But the stat. 12 Car. 2. c. 24. having changed all the ancient military tenures into socage, it is sufficient at this time, to consider the rights and powers of the guardian in socage, and of the testamentary guardians appointed under the authority of the same statute. These guardians, as they do not derive their title from the infant himself, but from the appointment of the law, are considered as having, not a bare authority, but an interest in the lands of the infant, and therefore may make leases of his lands in their own names,

(z) Ibid.

which will be good during the minority of the ward. And consequently, in respect of such leases, they possess the same powers of Distress, as other persons granting leases in their own right. (*a*)

Committees of Lunatics.

Committees of the estates of lunatics, were formerly persons appointed by the court of chancery only to superintend and manage such estates, but not possessed of any interest therein. They are however now enabled by the stat. 43 Geo. 3. c. 75, to grant leases of the lunatic's estate, under the direction of the Lord Chancellor; and therefore, like other lessors, are entitled to distrain for the rent accrued.

Receivers.

It is said that receivers appointed by the court of Chancery have a right to distrain, and may do so without waiting for the order of that court. (*b*) But such receivers having no estate whatever in the land, cannot of course distrain in their own names: and are therefore to be considered merely as bailiffs or stewards, distraining, under the sanction of the court, in the name of the person legally entitled to the rent.

Distress by Corporations.

Corporations with reference to their powers of Distress, may be divided into sole and aggregate;

(*a*) *Shopland* v. *Rydler*, Cro. Jac. 65, 98. *Bedell* v. *Constable*, Vaugh. 179.

(*b*) *Pitt* v. *Snowden*, 3 Atk. 750.

CHAP. III. the respective rights of which, both as to the remedies of action and distress, differ in some respects, from those of common persons.

Distress by the King.

The first to be considered is that of the King, who by his prerogative, is entitled to peculiar legal remedies, and among the rest to a more ample and beneficial power of Distress for rent, than belongs to a subject. For at the common law, if a grant of land or rent were made to the king, he could distrain without attornment, by virtue of his prerogative. (*c*) And he may now distrain for a rent-service, or fee-farm, not only on the land of his tenant, out of which it is reserved or granted, but also, on all the other lands of the tenant, although held of other lords. (*d*) And he has the same prerogative with respect to a rent-charge, (*e*) and even a rent-seck, although it vest in him, not by grant, but by escheat upon attainder: (*f*) provided, that the lands to be distrained upon, be in the actual possession of his tenant. (*g*) If however the king's tenant make an underlease, *after* arrears of rent incurred, the king has a right of Distress upon all the lands of his under-tenant, for the rent due to the crown upon the land so underleased. (*h*)

(*c*) Co. Litt. 309.
(*d*) Bro. Prerog. pl. 77.
(*e*) Ibid. pl. 68.
(*f*) *Warden and Commonalty of Sadlers* Case, 4 Rep. 56.
(*g*) 4 Inst. 119. 2 Inst. 132.
(*h*) 1 Rol. Abr. 670.

Not only the king, but even his grantee, has some peculiar privileges of Distress. For at the common law, if the king granted to a subject a reversion or services, the estate passed immediately without attornment, and the grantee might distrain, (*i*) unless it were of lands held of the Dutchy of Lancaster, and not situate within the County Palatine. (*k*) The statute of 22 Car. 2. c. 6. for the sale of the fee-farm rents of the crown, gives to the vendees of such rents, the same remedies for the recovery of them as were possessed by the crown; and therefore they may distrain upon all the lands of the original grantor. And as it should seem, either the king or his vendees, may make such a Distress, although the lands distrained upon, be under a sequestration. (*l*) But the statute does not extend to any other than the fee-farm rents sold under its authority; and therefore the king's grantee of a rent-charge, cannot now, any more than he could at the ancient common law, distrain in any other lands than those upon which the rent is charged. (*m*)

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Distress by his Grantee.

Corporations sole, except the king, whether ecclesiastical or civil, do not possess any peculiar rights, or lie under particular disabilities, with regard to the power of Distress; but fall under the

Distress by other Corporations sole.

(*i*) Id. 294.

(*k*) Co. Litt. 314. b. *Dutchy of Lancaster* Case, Plowd. 221. 4 Inst. 209.

(*l*) *Attorney Gen.* v. *Mayor of Coventry*, 2 Vern. 713. 1 P. Wms. 306. S. C.

(*m*) Bro. Prerog. pl. 68.

CHAP. III. general principle, of distraining according to the nature of their estate. Freehold interests in land or rents, descending to the successors of sole corporations, but chattels real and personal to the executors or administrators of the lessor or lessee, (*n*) except in some cases by particular custom. (*o*)

With respect to leases made by corporations, whether conformable to the statutory provisions so as to bind the successor, or otherwise, the remedy of Distress is the same as belongs to such a lease at the common law, at least with respect to the lessor. For "though leases contrary to these "acts are declared void; yet they are good against "the lessor during his life, if he be a sole corporation; and are also good against an aggregate "corporation, so long as the head of it lives; "who is presumed to be the most concerned in "interest:"(*p*) therefore if good against the lessor, they would generally be good against the lessee by the mutuality of estoppel.

By Corporations aggregate.

Corporations aggregate, whether civil or ecclesiastical, cannot in general perform any acts *in pais*, but under their common seal: (*q*) and therefore they should both make and accept leases or other conveyances of land or rent, under such seal.

(*n*) Co. Litt. 9. a. 46. b.
(*o*) Ibid. et Harg. note (1) on Co. 9. a.
(*p*) Bl. Comm. 2 321.
(*q*) *Mayor of Thetford's* Case, 1 Salk. 192.

But if a lease be made by the agent of a corporation, not under their common seal, although it may be invalid as a lease, for want of due execution; yet if the tenant hold under it, and pay rent to the bailiff of the corporation, that is sufficient to constitute a tenancy at least from year to year, and to entitle the corporation to distrain for the rent. (*r*)

Bodies politic and corporate, are by the stat. 4 Geo. 2. c. 28. placed on the same footing as other persons, with respect to the recovery of rents-seck, chief rents, and rents of assize.

Distress by a Lord for Copyhold Rents.

The lord of a manor may, of common right, distrain for the rent due from the tenants of his manor; (*s*) for to this tenure fealty is incident, and therefore such rent is in its very nature a rent-service: and the lord may distrain for it not only on the copyholder himself, but his lessee, the lands being chargeable in the hands of any one claiming under the copyhold tenant; although they are not chargeable in the hands of a new tenant admitted to the copyhold, for the rent due from his predecessor. (*t*) But if the lord parts with his manor, all privity of estate is destroyed between him and the copyhold tenants, and there-

(*r*) *Wood* v. *Tate*, 2 New Rep. 247.

(*s*) *Laugher* v. *Humphrey*, Cro. Eliz. 524.

(*t*) Watk. on Cop. Vol. 2. p. 180.

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fore he cannot afterwards distrain for arrears of rent before incurred. (*u*)

It has been already observed, that copyhold rents have been considered not to be within the stat. 32 Hy. 8. c. 37; (*x*) but this seems to be questioned by a learned writer, who is also inclined to think that rents of assize issuing out of copyhold lands, are equally within the stat. 4 Geo. 2. c. 28. s. 5. as if they issued out of freeholds; and that if it were proved, that the rents claimed were the usual or accustomable rents reserved, it would be incumbent on the other party, to shew that they had not been answered or paid within the period prescribed by that statute. (*y*)

Mortgagor and Mortgagee.

Upon the execution of a Mortgage, the legal estate in the mortgaged premises vests at once in the mortgagee, and if they are not in lease, he is consequently entitled to the immediate possession. It is indeed usually stipulated, that the mortgagor shall continue in possession until default be made in repayment of the loan at the time specified in the proviso for redemption; but he has thereby no estate in the land, and is only entitled to hold it, and receive the rents and profits during that period, under the authority of the mortgagee. (*z*) But as

(*u*) Ibid. p. 181.
(*x*) Ante, p. 77.
(*y*) Watk. p. 181, 182.
(*z*) In *Birch* v. *Wright*, 1 T. R 382. The mortgagor is considered as a kind of tenant at will, or by sufferance to the mortgagee, but this can apply

the mortgaged premises may at the time of the mortgage, be subject to a lease, or may during the continuance of the mortgage, be leased by the mortgagor, it becomes necessary to consider, what are the respective interests of the mortgagor and mortgagee in the rent in these two cases.

Where the premises are leased before the mortgage, it is clear that the possession of the tenant cannot be disturbed by the mortgagee, who comes in by a later title; although, as the assignee of the lessor, he is of course entitled to demand the rent accruing after his right of possession: and therefore, if the mortgagee give notice to the tenant to pay the rent in future to himself, instead of paying it to the mortgagor, he may certainly distrain for any rent becoming afterwards in arrear. And it has been decided, that after a demand made on the tenant for arrears accrued before such demand, but subsequently to the mortgage, the mortgagee may distrain for those arrears. (*a*) For by the mortgage, the estate of the mortgagor is transferred to the mortgagee, to whom, from the time of the mortgage, the rent is due. And whether the rent be in arrear before, or after the notice, can make no difference to the

only to those cases, where there is no such stipulated time of possession, or where the mortgagor is *permitted* by the mortgagee to continue in possession after the expiration of that time.

(*a*) *Moss* v. *Gallimore*, Doug. 278.

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tenant, who after such notice, is bound to pay the rent in hand, according to the legal title: and therefore his payment of it to another can be good, only where he has no notice of the mortgage, or where he may be considered as paying it with the mortgagee's consent.

There may however be some doubt respecting a mortgagee's right to distrain upon a lease made by the mortgagor after the mortgage: for it has been determined, that where a lease was made by the mortgagor, for the term of seven years, at a rack-rent, the mortgagee having no notice of the lease, and the lessee having no notice of the mortgage, the mortgagee was entitled to bring ejectment against the lessee, even without a notice to quit; upon the ground of the lease's being subject to every circumstance of the mortgage, and of the mortgagee's right of possession. (*b*) This case therefore proves, that such a lease is absolutely void as against the mortgagee, and he could not perhaps, by any act of assent, so far establish it, as to make the tenant hold of him under the lease itself: but his assent to the tenant's possession might create a tenancy under himself from year to year; and the lease being considered only as evidence of the *quantum* of rent, the mortgagee might perhaps be entitled to distrain for it accordingly.

(*b*) *Keech* v. *Hall*, Doug. 21.

For the rent reserved by such a lease, if it were made by deed indented, and the lessee were not evicted by the mortgagee, the mortgagor would be entitled to maintain an action of debt or covenant on the deed, and as it should seem, distrain for the rent reserved, by virtue of the estoppel. But for the arrears due on a lease made before the mortgage, the mortgagor cannot in any case distrain; for here, there is no estoppel after the mortgage, by which all privity between the mortgagor and the tenant is completely destroyed.

Distress by Lessors on Leases for years, &c.

Having already minutely inquired into the rights of Distress for rent, as incident to persons in the several legal characters or relations before enumerated; very little remains to be added, as to the general right of Distress for rent reserved on leases for years, or other less period of time.

From our preceding inquiry it appears, that persons standing in the situation of landlords or lessors for years or at will, might even *at the common law*, have distrained for the rent reserved upon such lease or demise, provided they had a future reversion in the land, whether immediately expectant on the determination of the term, or at a more distant period. (*c*) But the necessity of a reversion to support a Distress, is now materially

(*c*) Co. Litt. 142. b.

altered by the operation of the statute 4 Geo. 2. c. 28. s. 5. by which, as I have before observed, all rents-seck are made distrainable: (*d*) and therefore a reversion is no longer requisite to support a Distress, for that which is a rent-seck within the meaning of this statute. But at the common law it was not every reservation, though *nominally of rent*, which constituted *a rent* properly so called: for as we have before seen, if an annual sum of money were reserved upon the grant of an incorporeal hereditament, the sum so reserved, was not *a rent*, but only *a personal annuity*. (*e*) And therefore nothing is distrainable within the statute of Geo. 2. which is not such a reservation as would have been at least a *rent-seck* at the common law: and as it seems to have been a rule of the common law, that *a rent* could not issue out of a mere chattel, (*f*) it has been determined on this principle, that even since the statute, if a lessee for years assign over his whole term reserving a rent, without a special clause of Distress, he cannot distrain for the rent so reserved. In deciding this point, the Court of Common Pleas is reported to have expressed itself as follows: "There are two ways of creating a rent; the "owner of the lands either grants a rent out of it, "or grants the lands, and reserves a rent; there

(*d*) See ante, p. 35.
(*e*) See ante, p. 24.
(*f*) See *Butt*'s Case, 7 Rep. 23. Lord *Mountjoy*'s Case, 5 Rep. 4. *The Earl of Stafford* v. *Buckley*, 2 Ves. Rep. 170. *Turner* v. *Turner*, 1 Bro. Ch. Rep. 316.

" is no such thing as a rent-seck, rent-service, or " rent-charge, issuing out of a term for years. " Bro Dette, pl. 39, cites 43 Edw. 3. 4. per " Fynchden Chief Justice C. B. If a man hath a " term for years, and grants all his estate of the " term, rendering certain rent, he cannot distrain, " if the rent be in arrear. This case is law, and " in point; therefore if the avowant will recover " what is owing to him from the plaintiff, he must " bring his action upon the contract." (*g*)

The real point determined in this case, is that an annual sum of money reserved upon *a chattel*, on which the lessor has no reversion, is not *a rent*, but a *mere annuity*, and therefore is not distrainable as a *rent-seck*, under the statute of Geo. 2. But this case, (allowing to it the fullest authority) does not at all apply to any reservation or grant of rent, during an estate of freehold, which was unquestionably *a rent* at the common law, and as such is distrainable as a *rent-seck* within the statute, without a reversion or a clause of Distress.

A similar principle was adopted, in a more recent case than the one last cited, where a lessee

(*g*) —— v. *Cooper*, 2 Wils. Rep. 375. The decision of this case seems to be founded on sound principles of law; but it is much to be regretted, that we have not a more satisfactory report of the reasons upon which the court formed their judgment on so important a subject; for the passage quoted from Brooke, affords no proof of the point for which it is cited.

Parmenter v Webber, 7 B Moore 656

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for years assigned over his term, and afterwards the lease came back into the hands of the original lessor, by an agreement between him and the assignee, that the lessor should have possession of the premises, paying a certain sum annually above the rent, towards the good-will already paid by the assignee; it was held, that such agreement operated as a surrender of the whole term; and therefore, that the sum so reserved, was a mere *annual sum in gross*, and not a rent for which the lessee could distrain. (*h*)

With respect to the amount of rent for which lessors may in different cases be entitled to make a Distress, it may be laid down as a general rule, that whatever can be properly considered as a part of the rent, may be distrained for, whatever be the particular mode in which it is agreed to be paid. So that where a person entered into possession of certain premises, subject to the approbation of the landlord, which he afterwards obtained, by agreeing to pay an advanced rent from the time he came into possession, it was determined that the landlord might distrain for the whole sum accrued before and after the agreement. (*i*) For on whatever day the tenant agrees that the rent shall become due, the law gives the landlord a power of distraining for it at that time. (*k*)

(*h*) *Smith* v. *Mapleback*, 1 Term Rep. 441. 784.

(*i*) *Macleish* v. *Tate*, Cowp.

(*k*) Per Buller Just. *Buckley* v. *Taylor*, 2 T. R. 600.

The rule for the Distress therefore is, that it be in all respects conformable to the nature of the reservation and demise: so that, if there be two separate demises contained even in the same deed, a joint Distress should not be made for the two several rents. (*l*) And if a tenant hold up to a certain period under one demise, and afterwards his possession is continued under another, although each demise be made only by parol, a joint Distress should not be made for the rent accrued under the two demises. (*m*) But if a parol lease be made, *de anno in annum, quamdiu ambabus partibus placuerit*, and the lessee occupy during ten years, this by computation from time past, makes an entire lease for so many years; and if rent be in arrear for part of one of those years and part of another, the lessor may distrain, as for so much rent in arrear upon an entire lease, and is not obliged to make separate Distresses, as for several rents due on different demises. (*n*)

For the Rent of furnished Lodgings.

A Distress may be made not only for the rent of lands and houses, but also for the rent of any part of a house, as a single room or apartment therein, if it be the subject of a particular demise. And even if such an apartment be let furnished, a Distress may be made for the whole rent reserved,

(*l*) *Rogers* v. *Birkmire*, Rep. temp. Hardw. 245 *Tanfield* v. *Rogers*, Cro. Eliz. 340.

(*m*) *Stanfield* v. *Hicks*, Ld. Raym. 280.

(*n*) See *Legg* v. *Strudwick*, 2 Salk. 414. *Birch* v. *Wright*, 1 T. R. 380. and Roberts on Stat. of Frauds, p. 242.

CHAP. III. because in contemplation of law, it issues wholly out of that part of the demised premises, which belongs to the realty. (*o*)

Double Rent. There is indeed one case, in which landlords or lessors are entitled to double the rent reserved, which is by virtue of the stat. 11 Geo. 2. c. 19. s. 18. enacting, that if any tenant shall give notice to his landlord, of his intention to quit the possession of the premises demised at a particular time, and shall not deliver up possession accordingly, he shall pay to his landlord double the former rent, for the whole time he shall hold the premises after the expiration of such notice; and that such double rent may be levied, sued for and recovered as the former single rent might have been. By the effect of which provision, landlords are now in all such cases entitled to make a Distress for the double rent so incurred. (*p*)

Upon this statute it has been determined, that whether the tenant hold under a lease or a parol demise, it is equally within its provision; and that it is immaterial, whether the tenant's notice be in writing or by parol. (*q*) But if the landlord accept the single rent after the tenant has given notice and hold over, it is a waver of his claim to the double rent, given by the statute. (*r*)

(*o*) *Newman* v. *Anderton*, 2 New Rep. 224.
(*p*) *Timmins* v. *Rawlison*, 2 Bl. Rep. 533.
(*q*) Ibid.
(*r*) *Doe* v. *Batten*, Cowp. 243.

It is also said to have been held in in a very recent case, that although where a demise is for a time certain, no notice to quit is necessary; yet if the tenant hold over, a notice in writing and demand of possession are requisite to entitle the landlord to double rent or value; but that such notice and demand may be at any time after the expiration of the term, if the landlord do not in the mean time acknowledge a subsisting tenancy: and that if the rent be reserved quarterly, and the demand be made in the middle of a quarter, the landlord cannot recover single rent for the antecedent portion of that quarter. (*s*)

(*s*) *Cobb* v. *Stokes*, 8 East, 358. From the report of this case, there does not seem to have been any notice given on the part of the tenant; and as the court appear to have considered the landlord's claim either to double value or double rent, as arising altogether upon his notice to quit, and demand of possession; it should seem, that this case falls wholly within the stat. 4 Geo. 2. c. 28, giving double value; and is quite independent of the stat. 11 Geo. 2. c. 19. entitling the landlord to double rent.

CHAPTER IV.

Of the Persons whose Goods are liable to be Distrained for Rent.

It may be considered as a general rule, that all goods found upon the premises demised to a tenant, are liable to be distrained by his landlord for rent; whether such goods belong to the tenant, or to other persons. (*t*) The necessity of this rule is obvious, when we consider by what varieties of fraud and collusion, the rights of a landlord would be liable to be defeated, if he were restricted in his remedy of Distress to the goods of his tenant alone. The law has however in various instances, taken care to protect the property of strangers, if found on the premises without the knowledge or default of its owner, or brought there for the purposes of trade; which on account of its public

(*t*) Com. Dig. Distr. B. 1.

benefit, is allowed to confer exemption on those things that are employed in its transactions. CHAP. IV.

It will be necessary hereafter to enter into a general inquiry respecting the nature of those things which may be taken as a Distress: and then I shall have occasion to consider various cases of exemption arising out of the circumstances in which the goods to be distrained are found. But there are other cases of exemption, arising out of the right of property in the things to be taken as a Distress. These will properly form the subject of our present inquiry.

Distress on the possession of the King.

The first of these privileged cases is that of the king, who is not only entitled to peculiar rights of Distress, but also to peculiar exemptions from it: for as a Distress was originally considered as a pledge, or security for satisfaction taken out of the hands of a wrong doer, it being inconsistent with the dignity of the crown, that the king should be treated as a wrong doer: it is a general rule, that no man can distrain upon the land in the possession of the king, whether upon office found or not. (*u*) So that, if lands be seised into the hands of the king, even by false office, the lord of the seigniory cannot distrain; for the office, though false, is, whilst it continues to be in force, sufficient to preclude a Distress. (*x*) So, if the king

(*u*) Bro. Distr. pl. 46. (*x*) Ibid. pl. 77.

CHAP. IV. be entitled, by office found, to land out of which a rent-charge is issuing, the grantee of the rent cannot distrain upon the possession of the king; but if he grant over the land, then the rent may be distrained for, it not being extinguished, but only suspended by the possession of the king; and that possession ceasing, the remedy revives. (*y*)

Or of his Grantee.

In many cases however, the Distress is suspended, not only during the possession of the king, but even of his grantee; as where the land is once absolutely vested in the king; for although where the king enters without office or record, his patentee may be distrained upon; yet if he be entitled by office or record, and grant the land, no Distress can be made upon his grantee. (*z*) This rule is however confined to a Distress made in respect of rent issuing out of the land itself, and not of a rent-charge upon it; for by the office and record, he who was possessed of the land is ousted, and the land vested absolutely in the king, and therefore the lord whose title is destroyed cannot afterwards distrain upon the grantee. But a rent-charge is not destroyed by such office or record, being only suspended by the possession of the king, who cannot hold land subject to a charge; (*a*) and therefore the remedy for it is restored by the crown's parting with the possession of the

(*y*) Ibid. pl. 27. *Anonym.* Saville, 125.

(*z*) Bro. Distr. pl. 47.

(*a*) Bro. Abr. Prerog. pl. 120.

land: (*b*) but if the rent-charge, as well as the land, were found by the office, it seems that the remedy of Distress would be absolutely gone. (*c*) So if the king were entitled to the wardship of the heir of his tenant, and the land were charged with a rent, and the king committed to another the wardship *durante minore ætate*, it was held, that the grantee of the rent could not distrain upon the committee of the heir: (*d*) for the wardship was the king's, and whilst it continued, he might be considered as in possession by the hands of his committee.

Ambassadors, &c.

Another personal exemption from a Distress, is created by stat. 7 Anne, ch. 12, by which the goods of all ambassadors, or other public ministers of any foreign prince or state, or the domestic servants of any such ambassador, or public minister, are privileged from Distress as well as execution. (*e*)

Distress on Persons having an Estate in the Land.

There are no other persons who are individually privileged from a Distress, except those who are exempted from it on account of some interest in the land which they have jointly with the distrainor. Thus we have seen, (*f*) that among coparceners, if

(*b*) Bro. Abr. Trav. de office, pl. 32. Petition, pl. 9.

(*c*) Id. Entre congeable, pl. 125.

(*d*) Id. Distr. pl. 39.

(*e*) I am not aware that any cases of Distress have arisen on this statute. See the other cases collected in Com. Dig. Ambassador B. and *Hopkins* v. *De Robeck*, 3 T. R. 80.

(*f*) Ante, p. 57.

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one have a rent issuing out of lands, which she holds with her sisters in coparcenary, she cannot distrain upon them before partition made, on account of their privity of estate. But there is no such privity between tenants in common, who may lease to each other their parts in the land, and distrain for the rent accordingly. (*g*)

On Coparceners.

As persons seised of joint estates, cannot in general sever them to the prejudice of others, it is said, that if coparcenary tenants make partition of their lands, without notice to the lord, he may still distrain upon them jointly, as before partition. (*h*)

Distress on Joint-Tenants.

It has already been observed, (*i*) that although joint-tenants may grant or lease the land held in joint-tenancy, and even destroy the joint-tenancy itself; yet they cannot charge the land to the prejudice of their co-tenants, whilst the joint-tenancy continues: and therefore, that one joint-tenant is not liable to be distrained upon for a rent-charge created by another. (*k*) But like tenants in common they may hold of each other, and be distrained upon accordingly; the Distress being confined to the part of the land so holden. (*l*) And they are liable to be distrained upon even for a

(*g*) Bro Distr. pl. 65.
(*h*) *Iremonger* v. *Neusam*, Latch. Rep. 261.
(*i*) Ante, p. 60.
(*k*) Ante, p. 58.
(*l*) Co. Litt. 186. a. Bro. Distr. pl. 69.

rent-charge granted by another, if they hold by a later title. So that if one tenant grant a rent, and afterwards lease the land for years to his co-tenant, he will hold the land subject to a Distress for the rent-charge. (*m*)

Distress for a Rent-Charge.

But where the tenant of the land holds by a title paramount the Distress, he is not liable to it. So that, if a man be seised of a rent-charge by prescription, issuing out of a manor, he cannot distrain the cattle of the copyholders of the manor, if there be not a custom to warrant the Distress: because they are in by prescription also, and their title is therefore as high as that of the owner of the rent. And it is said, that the law in this respect is still more clear if the rent be claimed by grant. (*n*) So if a man seised in fee, made a lease for life, and afterwards granted to another a rent-charge; it was formerly held that the grantee might distrain the cattle of the grantor, if they came upon the land, but that he could not distrain the goods of the tenant, who held by a title elder than the grant: (*o*) and it was said to be the same, if the tenant held at will, unless the grant of the rent were considered as amounting to a determination of the will. (*p*) But these two last mentioned cases seem to have been derived from the principle of there being no privity between

(*m*) Ibid.
(*n*) 1 Roll. Abr. 669, 670.
(*o*) Brownl. pt. 1, 32.
(*p*) 1 Roll. Abr. 669.

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the tenant and grantee without attornment; which is now almost abolished by the stat. 4 & 5 Anne, c. 16, rendering attornment unnecessary, as to all rents created since that act, (*q*) where the tenant is not liable to be prejudiced by a payment to the grantor, without notice of a grant of the rent.

Where a rent-charge can be distrained for, the remedy follows the land in the hands of any succeeding tenants; and therefore if one grant a rent-charge, and afterwards the land comes into the possession of several tenants, a Distress for the whole rent may be made upon the possession of any one of them; for the entire rent issues equally out of every part of the land. (*r*)

On Executors or Administrators.

As a Distress is considered in the nature of a remedy upon the land, if the tenant be dead, the goods of the deceased may be distrained in the hands of his executor or administrator, for the rent accrued before and after his death. (*s*)

Persons holding under an implied Tenancy.

To render a person's goods liable to a Distress for rent as a tenant, it is only necessary that a

(*q*) *Long* v. *Buckeridge*, 1 Stra. 406.

(*r*) 1 Roll. Abr. 671.

(*s*) *Braithwaite* v. *Cooksey*, 1 H. Bl. 465. *Bolton* v. *Canham*, Pollexfen 120. There are some cases in which an executor may wave a lease made to his testator, and relinquish the possession; but these can of course apply only to questions relative to actions on the contract, and not to the remedy of Distress.

tenancy in effect should subsist, without reference to the manner in which it is created: the only question being, whether the relation between the parties does really constitute a tenancy. So that, where a person granted lands to another, for a term of years, to secure an annuity, and the grantor continued to occupy the lands; it was held that the grantee might distrain for the arrears; the grantor's occupation being considered as a mere tenancy under the grantee. (*t*) And if a lessee be a disseisor by a tortious entry, before the commencement of his lease, yet he is tenant from its commencement and his goods may be distrained for the rent. (*u*) Or if another disseise the lessee, and continue in possession, the lessor may distrain the disseisor's goods, for the rent reserved by the lease. (*x*) But where the goods, even of a former tenant, are rightfully on the land, they cannot be distrained for another's rent. Thus, a tenant at will, if quitting upon notice from his landlord, is entitled to the emblements or growing crops: and therefore, even after they are reaped, if they remain on the land, for the purposes of Husbandry, they cannot be distrained for the rent of the succeeding tenant. (*y*) And they are equally privileged in the hands of a vendee. (*z*)

(*t*) *Fairfax* v. *Gray*, 2 Blackst. R. 1326.

(*u*) *Macdonnel* v. *Welder*, Stra. 550.

(*x*) *Humphrey* v. *Damion*, Cro. Jac. 300.

(*y*) *Eaton* v. *Southly*, Willes, 131.

(*z*) Ibid.

CHAP. IV.

Under-Tenants.

If the goods of a stranger be, in many cases, liable to a Distress for the rent due from the tenant, it is still more reasonable that it should extend to the goods of a person holding as an under-tenant to the lessee; and whose occupation must indeed in general be considered with respect to the lessor, as the possession of his lessee. And therefore the goods of such under-tenant are of course liable to be distrained during the continuance of the original lease. But it was in many cases necessary at the common law, that a lease should be completely surrendered before it could be renewed; and this was often prevented by the under-tenant's refusing to surrender their under-leases; without which there could not be a renewal of the principal lease, out of which they were derived. To remedy this evil, the stat. 4 Geo. 2. c. 28. has enacted, that such renewal of the principal lease, shall be completely valid and effectual, without a surrender of the under-leases; and that the original lessor, and his executors and administrators may distrain upon the under-lessees, for the rent reserved upon the renewed lease, as if the original lease had been still subsisting, so far as such rent shall not exceed the rent originally reserved.

Goods of a Stranger.

To exempt the goods, even of a stranger, from a Distress for rent, it is necessary that they should be on the premises demised, under peculiar circumstances. As, First, for the purpose of trade;

in which case, on account of the public advantage of trade, they are privileged from Distress. (*a*) Or, Secondly, that the place in which they are found, should be itself privileged for the like reason of general benefit; as a market, fair, or public inn. (*b*) Or, Thirdly, that they be on the premises without their owner's knowledge or default; as cattle straying into the land, through its defective fences, which the tenant or his landlord is bound to repair; in which case they cannot be distrained by a *lessor*, for rent reserved, until after notice given to their owner to remove them. But this restriction is said not to extend to the grantee of a rent-charge, nor to the lord distraining for an ancient rent, who may in all cases distrain the cattle after they have been *levant and couchant* on the land, unless their owner pursue and retake them before such Distress be made. (*c*) CHAP. IV.

Of Goods in the Custody of the Law.

It is a rule, that neither the goods of the tenant or a stranger can be distrained for rent, if they are already in the custody of the law: as if taken damage feasant, or under an extent, or execution; unless such execution be already satisfied: (*d*) because in these cases, an interest in the goods is

(*a*) Vide post. Chap. 14.
(*b*) Ibid.
(*c*) 1 Roll. Abr. 668. 669. *Gill* v. *Gawin*, 2 Roll. Rep. 124. *Kimp* v. *Cruwes*, 2 Lutw. 1577. S. C. Ld. Raym. 168. *Anonymous*, 2 Leon. 7. Bl. Com. 3. p. 8, 9. Harg. note (3) Co. Litt. 47. b. Wms. Saund. 289. note (7).
(*d*) *Harwell* v. *Burwell*, Sir W. Jones, 456.

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vested in third persons by the act of law, which cannot be divested, unless by their own default. As the cases falling under this rule, for the most part, resolve themselves into questions of property, it may be fit to consider them in this place.

The ancient rule of the common law, that goods already in the custody of the law, cannot be distrained, still remains perfectly unimpeached: but although the landlord cannot take such goods into his hands as a Distress, yet a provision of the stat. 8 Anne, c. 14. has given him, to a certain extent, a lien on his tenant's goods when taken in execution. And it is now, principally with reference to that statute, that the question of property in such goods comes to be considered.

Stat. 8 Anne, c. 14.

The provision alluded to, is contained in the 1st section of that statute, which enacts, that no goods, taken on any lands leased for life, years, at will, or otherwise, shall be taken in execution, unless the party at whose suit execution is sued, before removal of the goods, pay to the landlord the arrears of rent, if not exceeding one year's rent; and if more, then the amount of one year's rent, due at the time of the execution. But by the 8th section of the same statute, it is provided, that the crown may levy, recover or seize any debts, fines, penalties or forfeitures, as if that act had not been made.

The effect of this exception is to leave the landlord's claim for rent upon goods taken in execution, at the suit of the crown, just as it stood at the common law. According to which, a debt due to the crown was always preferred to one due to the subject. So that not only where an extent has actually issued, are the goods bound by it, but even without an extent, the debt itself is held to create an immediate lien on them, which in general cannot be divested. (*e*) Thus in a case where the landlord had distrained goods for rent, but before the sale of them under a Distress, they were seised upon an extent; it was determined, that the extent took place of the landlord's claim for rent. And in a former case, a similar determination was made, although the time for the sale had expired, and an attachment had been moved for against the sheriff, for not having sold the goods under the writ of *Venditioni exponas.* (*f*) So where a man was outlawed, and an extent issued thereupon, and his goods were seized; although the landlord distrained three days before the extent, it was held that he was not entitled to any part of his rent, under the stat. 8 Anne. (*g*)

Upon that part of the statute, which gives to the landlord a right to his rent, as against an exe-

(*e*) Vide post, p. 119.

(*f*) *Rex* v. *Cotton*, Parker 112. *Rex* v. *Dale*, Id. 141. And see *Rex* v. *Pritchard*, Bunb. 269.

(*g*) *Rex* v. *Southerby*, Bunb. 5. Sed. vide *Greaves* v. *D'Acastro*, Id. 194.

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cution at the suit of a subject, several decisions have been made; by which it has been determined, First, that this provision extends only to the immediate landlord of the premises, and not to the ground landlord distraining the goods of an under-lessee. (*h*) Secondly, that the landlord must give notice to the sheriff in possession, and demand his rent, for that otherwise it is not the sheriff's duty to retain it. (*i*) Thirdly, that the landlord is entitled to be paid his rent according to the statute without any deduction for the sheriff's poundage on the execution; (*k*) but, that the sheriff may deduct such costs, as were incurred before notice given to him of the rent due to the landlord. (*l*) Fourthly, that if there be two executions on the tenant's goods, the landlord is not entitled to have a year's rent out of each, but must demand out of one of them, his whole rent under the statute. (*m*) Fifthly, that if the sheriff do, after notice, wrongfully remove the goods, he is not liable for the rent, beyond the amount of the goods sold, after making such deductions as may be allowed for expences. (*n*) Sixthly, that the rent to which the landlord is entitled, is that due for the year immediately preceding the execution; and therefore, if the tenant hold under a lease at one rent, and af-

(*h*) *Bennet's* Case, Stra. 787.

(*i*) *Waring* v. *Dewberry*, Stra. 97. S. C. Fortesc. 360.

(*k*) *Gore* v. *Gofton*, Stra. 643.

(*l*) *Henchett* v. *Kimpson*, 2 Wils. 140.

(*m*) *Dod* v. *Saxby*, Stra. 1024.

(*n*) *Henchett* v. *Kimpson*, 2 Wils. 140.

terwards hold under a second demise, at another; the landlord cannot demand the amount of a year's rent unpaid upon the expired lease. (*o*) Seventhly, with respect to the nature of the execution itself, it has been held, to extend to the seizure of goods upon process on Outlawry, it being considered as an execution at the suit of a subject, and not of the king: (*p*) and that a bill of sale of goods taken on a *fieri facias*, is a removal of them within the statute. (*q*) Eighthly, that the landlord, upon removal of the goods, may have either an action on the case upon the statute against the sheriff, or may apply, in a more summary way, to the court, who will grant an attachment to compel restitution. And that after demand made, either an executor or administrator of a deceased landlord, may have the like remedies upon this statute, as a landlord himself: (*r*) but, that it does not extend to an administrator, to whom administration was granted after the goods sold under the execution; and who consequently could not make a demand of the rent, whilst they were in the hands of the sheriff. (*s*) Lastly, that in an action on this statute, against the sheriff, for taking away the goods without leaving the rent due

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(*o*) *Cook* v. *Cook*, Andr. 219.

(*p*) *Graves* v. *D'Acastro*, Bunb. 194, Sed. vide *Rex* v. *Southerby*, Id. 5.

(*q*) *West & Ux* v. *Hedges*, Barnes, 211.

(*r*) *Henchett* v. *Kimpson*, 2 Wils. 140. *Twells* v. *Colville*, Willes, 377. *Chace* v. *Chace*, Fortesc. 359. *Palgrave* v. *Windham*, Stra 214.

(*s*) *Waring* v. *Dowberry*, Stra. 97.

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to the landlord according to the act, the declaration needs not state all the particulars of the demise; but if it do, they must be proved as stated, or the plaintiff will be nonsuited. (*t*)

Of Goods, the Custody of which has been abandoned.

In addition to the cases which have arisen on this statute, it has also become necessary to determine, (with reference both to the rule of the ancient common law, respecting things in the custody of the law, and the stat. 2 & 3 W. & M. c. 5, rendering corn and grain liable both to execution and Distress) how far a person in possession of goods under an execution, may, by certain laches, be considered to have abandoned such possession. With respect to which, in a case where growing crops were seized under a *fieri facias*, and sold by the sheriff, and the vendee, after the return of the writ, severed them, and whilst they so remained on the ground, the landlord distrained them for rent, it seems to have been held, that the Distress was good. (*u*) But where the emblements of a tenant

(*t*) *Bristow* v. *Wright*, Doug. 665.

(*u*) *Parslow* v. *Cripps*, Com. Rep. 204. This case is very imperfectly reported. The circumstances appear to have been as stated in the text, and the question to have arisen on the vendee's rescuing the landlord's Distress, who thereupon brought an action on the case. The Distress seems to have been made for rent due from the tenant, whose crops were seized. And if so, the landlord was certainly entitled to a part, at least, of his rent under the stat. 8 Anne, c. 14; but the vendee's suffering the crops to remain after severance, (which by the report appears to be the principal point in the case) seems to be of no importance: for if the sale were good under the writ, he was entitled to use them beneficially, according to the ordinary rules of husbandry; but if the Distress

at will were seized under a *fieri facias*, and sold, and the vendee suffered the crops, after severance to remain on the ground, for the necessary purposes of husbandry; and then the landlord distrained for the rent due from the succeeding tenant; it was determined, that the Distress was bad; for whether the emblements belonged to the former tenant at will, or to his vendee, they were not liable to be distrained for another's rent, whether in the custody of the law or not: and as to their continuance on the land, that was of necessity. (*x*) CHAP. IV.

Distress on the Goods of a Bankrupt.

Another very important question of property arises in the case of the tenant's becoming bankrupt. As to which it is held, that the goods of a bankrupt remain liable to the landlord's Distress for rent, in the same manner as if no bankruptcy had taken place: for the statute of 8 Anne, applies only to goods taken in execution, without any reference to the case of bankruptcy. The landlord's remedy for his rent therefore remains as it was at the common law. Now by this, as we have seen, he is in general entitled to distrain upon all goods found on the premises demised; and therefore he may distrain for the whole rent due, whatever may be its amount, either after the messenger is in pos-

were made for the rent of a succeeding tenant, it seems to be perfectly clear from the case next cited, that such a Distress could not be supported.

(*x*) *Eaton* v. *Southby*, Willes, 131.

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session, and before assignment; or after assignment, and when the assignees are in possession. For the assignment only changes the property in the goods, which remain liable to be distrained, so long as they continue on the premises; and therefore if not removed, they may be distrained even after assignment and sale. (*y*) But, by removal, is not in all cases to be understood an absolute removal to another place; for where the goods of the bankrupt were sold by the assignees, to a person residing in the house of the bankrupt, they were held not to be liable to a Distress, although they happened to continue on the same premises. (*z*)

As a Distress is considered, rather as a remedy upon the land, than on the person of a tenant; the landlord is entitled, even after the assignment, to distrain the goods of a bankrupt, for the rent reserved, according to the terms of the demise, although they may be such, as to make the rent accrue immediately upon the tenant's entry on the premises, and the demise be made after the act of bankruptcy committed. (*a*) If however the landlord neglect to distrain, he can only come in *pro rata* with the other creditors. (*b*) And if he do distrain, and the tenant replevy the goods, which

(*y*) Cullen B. L. 123, 124. Cooke's do. 213—221.

(*z*) *Ex parte Grove*, 1 Atk. 104.

(*a*) *Buckley* v. *Taylor*. 2 T. R. 600.

(*b*) *Anonymous* 1 Atk. 102. *Ex parte Descharmes*, Id. 103.

are sold by the assignees, and the landlord afterwards have judgment for a return; his only remedy is on the replevin bond, for he has no lien on the goods, in the hands of the vendee. (*c*) CHAP. IV.

(r) Cooke, 218—220.

CHAPTER V.

Of the Time limited for making a Distress for Rent.

Of the Demand of Rent.

IT is of course requisite, that the rent for which a Distress is made, should be due according to the terms of the demise, before the time of making the Distress. But a previous demand of the rent is not always necessary, for much less strictness is required with respect to a demand of the rent, for the purpose of a Distress, than for that of re-entry, for a forfeiture accrued by its non-payment. Thus, if there be a clause in the lease, that the lessor may distrain for the rent, "*being* "*lawfully demanded*," notwithstanding the latter restrictive words, the lessor may distrain for the rent when due, without any demand. And so it would be in the grant of a rent-charge. For the remedy of Distress is not in destruction of the estate, but only taking a pledge for the payment of the rent. And the very making of the Distress

is considered as a legal demand. It is however in such cases advisable to make a demand, although not absolutely requisite to do so. (*d*) But if instead of the general words, "*being law-*"*fully demanded*," (which are satisfied by the very Distress itself) the reservation be such as to require a special demand; as if the clause were, that if the rent were behind, it should be demanded at a particular place, *not on the land;* or be demanded *of the person of the tenant;* then such special demand is necessary to support a Distress. (*e*)

If there be a rent so reserved, together with a *nomine pœnæ*, payable at different times, a separate demand for each must be made at such respective times. (*f*) And even if there be a general reservation of the rent and a *nomine pœnæ*, it should seem that the rent ought to be demanded to create a forfeiture of the penalty, although without such demand the Distress may be good for the rent. (*g*) But if there be a rent reserved payable at a certain day, and the tenant is ready on the land to pay it, and the landlord is not there to receive it, still the rent continues to be due: and if the landlord make a subsequent demand at any time, and the rent be not paid, he may distrain. (*h*)

(*d*) Bac. Abr. Condit. O. 2.
(*e*) *Browne* v. *Dunnery*, Hob. Rep. 208. *Kidwelly* v. *Brand*, Plowd. 69.
(*f*) Ibid. 208. ut supra.
(*g*) *Howell* v. *Sarnback*, Hob. Rep. 133.
(*h*) *Cranley* v. *Kingswell*, Hob. Rep 207.

CHAP. V. It may be observed that these rules with respect to the demand, seem to apply equally to the cases of rent-service, or rent-charge, although the latter may be in the hands of an assignee. (*i*)

But in all cases of a Distress for rent, if the tenant do, upon the land, tender the arrears of rent due, a Distress cannot afterwards be made. (*k*) And if the tender be made after the Distress but before it is impounded, the landlord cannot lawfully detain it. (*l*) In order therefore to give the tenant an opportunity of preventing the Distress, by a tender of the rent, it is held that a Distress cannot be made in the night-time, either for a rent-service or rent-charge. (*m*) And where the rent is of a particular kind, as that of the render of a rose, a Distress for it cannot be made until the season when roses are blown, for before that time it cannot be considered as due. (*n*) For the period at which the rent may be considered as due, and a Distress be made for it, depends upon the nature of the contract: and therefore where, by the custom of the country, half a year's rent becomes due upon the tenant's entry on the land, a Distress may be made for it immediately. (*o*)

Rent when due. As rent is not strictly payable until the last

(*i*) *Maund's* Case, 7 Rep. 28.
(*k*) *Six Carpenters* Case, 8 Rep. 147. 2 Inst. 107.
(*l*) Ibid.
(*m*) Co. Litt. 142. a.
(*n*) Litt. Sect. 129.
(*o*) *Buckley* v. *Taylor*, 2 T. R. 600. And see *Macleish* v. *Tate*, Cowp. 784.

minute of the natural day, a Distress cannot be made before the next day, for until that time, it is not absolutely due. (*p*)

It is not however sufficient to authorize a Distress, that the rent for which it is made, should be for as we have seen, (*q*) it is also necessary that a privity of estate should subsist between the person distraining and the tenant. So that in many cases, if the landlord or lessor has parted with his reversion in the premises demised, or done any other act, which destroys the privity of estate between himself and the tenant, his remedy of Distress is gone.

Distress after expiration of the term at the Common Law.

Upon this principle, it was held at the common law, that for rent reserved upon a lease, the lessor could not distrain after the determination of the term; for thereby the privity of estate was destroyed: (*r*) and therefore, for rent due on the last day of the term, the lessor could not distrain; because the term was ended. (*s*) If however the tenant held over, it seems to have been considered that the lease was so far continued, as to warrant a Distress for the rent. (*t*)

Under statute 9 Anne, c. 14.

This rule of the common law was productive

(*p*) *Duppa* v. *Mayo*, 1 Saund. 287. Harg. n. (6) on Co. Litt. 47. b.

(*q*) Ante, p. 33, 51.

(*r*) *Pennant's* Case, 3 Rep. 64. Bro. Distr. pl. 74.

(*s*) Co. Litt. 47. b.

(*t*) *Anonym.* Keilw. 96.

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of great injury; to remedy which, it was provided by the stat. 8 Anne, c. 14. s. that any person having rent in arrear upon any lease for lives, years, or at will, ended or determined; may after the determination of such lease, distrain for the arrears, as they might have done if the lease had not been ended: provided, that such Distress be made within six calendar months after the determination of the lease, and during the continuance of the landlord's title or interest, and the possession of the tenant, from whom such arrears are due.

This statute has thus given a remedy of Distress, in cases where it was gone at the common law: but it has not deprived the landlord of any right of Distress which he had before. And as at the common law, if the tenant held over after the determination of the lease, the landlord appears to have been entitled to distrain for the rent accrued before its determination. (*u*) So, it has been held since the stat. 8 Anne, c. 14, that where a part of the tenant's corn remained in a barn on the demised premises, beyond the period of six calendar months after the determination of the term, but within the time allowed by the custom of the country, for the outgoing tenant to get in and dispose of his crop; the corn might be distrained by the landlord. (*x*) And a similar

(*u*) Ibid. Bl. 7. (n).
(*x*) *Lewis* v. *Harris*, 1 Hy.

determination was made in a later case, upon the ground of such a custom being in fact a tacit agreement between the parties, that the contract between them shall continue until a certain period; and therefore, until such time, it must continue with all its original rights and properties. (*y*)

It has also been held, that the possession of the tenant under this statute, is not limited to the personal possession of the tenant himself, but that the possession of his administratrix is equally within the act: and consequently the landlord may within the period prescribed, distrain upon her for the arrears due before and since the death of the intestate. (*z*)

Distress on Goods fraudulently removed.

The second section of the same statute enacts, that if the lessee, whether for lives, years, at will or otherwise, shall fraudulently or clandestinely carry off his goods, from the premises demised, in order to prevent the landlord's Distress; the landlord may, within five days afterwards, distrain them as if they had still continued on the premises; provided, they be not sold within that time for a valuable consideration and without notice. And this term of five days is further extended by the stat. 11 Geo. 2. c. 19. to thirty days; and both the tenant so offending, and his abettors,

(*y*) *Beavan* v. *Delahay*, Id. 8.

(*z*) *Braithwaite* v. *Cooksey*, 1 H. Bl. 465.

CHAP. V. are made liable to pay to the landlord, double the value of the goods so fraudulently conveyed away. (*a*)

Of making several Distresses for the same Rent.

It is the duty of a landlord to make a Distress, at once, for his whole rent, if he can find sufficient goods on the premises; for various Distresses are vexatious to the tenant. And therefore, at the common law, if the landlord made an insufficient Distress when he might have taken more, a second Distress for the remainder of the same rent was illegal: for it was his own folly not to have taken enough at first; but if it appeared that he could not find a sufficient Distress on the land, then it seems, that even at the common law, he might distrain again. (*b*) And if the rent were due at several times, he might of course make several Distresses for it. (*c*) This restriction of the common law is however removed by stat. 17 Car. 2. c. 7. which enables the lessor, or his executors or administrators to make a second Distress, in case there be not sufficient goods found on the premises at the time of the first Distress; or that the party mistake the value of the things distrained. A provision which is calculated as much for the benefit of the tenant, as that of his landlord; for

(*a*) Vide post. chap. 6. as to the place in which the goods so removed may be taken; and post. chap. 12. for the manner of proceeding in making such Distress.

(*b*) *Wallis* v. *Saville*, 2 Lutw. 1536. *Anonym.* Cro. Eliz. 13.

(*c*) *Anon.* Moore, 7.

as it was observed by Lord Mansfield, (*d*) if a person were not permitted to distrain a second time, in case he at first makes an insufficient Distress, it might induce him to a necessity of taking effects of very great value; which in things of an uncertain or imaginary value, he might do without being guilty of an excessive Distress, and this would be far more prejudicial to the tenant, than to allow a second Distress to be made.

(*d*) In *Hutchins* v. *Chambers*, 1 Burr. 579.

If under an agreement for a lease at a rack rent, the tenant is let into possession before the lease executed, the lessor cannot during the first year distrain for rent, for there is no demise expressed or implied Hogan v Johnson. 2. Saund 148

CHAPTER VI.

In what Place a Distress for Rent may be made.

As the remedy of Distress was considered, at the common law, to be particularly connected with the land, it was generally restricted, either to the land out of which the rent issued, or at least to the seigniory of the lord to whom the rent was due.

Distress by the King.

This restriction did not however extend to the king, who is by his prerogative entitled to distrain for rent on all the lands of his tenant, and in some cases, even of an under-tenant: and is also entitled to take a Distress in the highway; (*e*) because every highway is the seigniory of the king. And in some cases, the grantees of the

(*e*) 2 Inst. 131.

crown have the same privilege as the king himself. (*f*)

Distress out of the Lord's Fee, or in the Highway.

By the ancient common law it was always held, that a lord could not distrain for a rent or service out of his fee or seigniory; (*g*) for otherwise, the Distress must have been considered, not as belonging to the land, but following the person of the tenant; from which this inconvenience would have followed, that the tenant might have been distrained in one manor, for the rent or service which he owed in another, and to a different lord. This restriction of the Distress to the seigniory, did not however, of course, apply to the case of a rent-charge; (*h*) for that necessarily carried the Distress to the land, on which it was charged; and the rent was due to the grantee, not in respect of a seigniory, but of the grant: and the Distress thus ensuing the nature of the grant, if the rent were granted out of one manor with a clause of Distress in another, the Distress might be made on the latter. (*i*) The king's highway was also by the ancient common law, considered as a place privileged from Distress. The lords however frequently took upon themselves to make such Distresses as were forbidden by the common law; to prevent which, the statute of Marlebridge, in affirmance of the ancient common law, enacted, that

(*f*) Ante, p. 93.
(*g*) 2 Inst 131.
(*h*) Ibid.
(*i*) Bro. Abr. Charge, pl. 17.

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no man should, for any manner of cause, take Distresses out of his fee, nor in the king's highway, or common street; but only the king, or his officers having authority to do the same. (*k*)

A Distress in the highway is therefore unlawful, although the highway itself be within the seigniory or fee of the lord who makes the Distress. (*l*) But this rule is confined to the first taking of the Distress; for if the lord coming to distrain, see the beasts within his fee, and before he can distrain them, they are chased into the highway, he may distrain them therein. (*m*)

The restriction of distraining within the fee of the lord, is also confined to the first making of the Distress. For, if the lord come to distrain cattle which he sees within his fee, and the tenant, or any other person, in order to prevent the lord from making the Distress, drive the cattle into some other place out of his fee; the lord may make fresh pursuit after the cattle, and distrain them. But if the lord have no view of the cattle whilst on his fee, although the tenant drive them off purposely to prevent a Distress; or if the cattle themselves, after the view, go out of the fee; or if the tenant, or any other person, after the view, remove them for any other purpose than

(*k*) Stat. Marlebr. c. 15. And see post, Chap. 13.

(*l*) Co. Litt. 160. b.

(*m*) 2 Instit. 132.

that of preventing a Distress, the lord cannot distrain them; and if he do, the tenant may make rescue. (*n*)

The principle established, both by the common law and the statute of Marlebridge, is, that the Distress shall follow the rent: and consequently be confined to the land, out of which it issues. Therefore, if two pieces of land be let by two separate demises, although both be contained in one lease, a joint Distress cannot be made for them: for this would be to make the rent of one issue out of the other: (*o*) but, where lands lying in different counties are let together by one demise, at an entire rent, and it does not appear that the lands are separate from each other; it shall be intended that they are contiguous, and one Distress may be made for the whole rent. (*p*) And where a rent is charged upon land, which is afterwards held by several tenants, the grantee may distrain for the whole, upon the land of any one of them; because the entire rent issues out of every part of the land. (*q*) But if a man seised of an advowson, make a lease thereof rendering rent; or if he demise a manor to which an advowson is appendant, yet he cannot distrain upon the glebe; for in this case, the rent issues out of the advowson, or out

(*n*) Co. Litt. 161. a.

(*o*) *Rogers* v. *Birkmire*, Rep. temp. Hardw. 245. S.C. Stra. 1040.

(*p*) *Walker* v. *Rumbal*, Ld. Raym. 55. S. C. 12 Mod. 76.

(*q*) 1 Roll. Abr. 671.

CHAP. VI. of the manor; but not out of the glebe, in which the lessor had no estate. (r)

Distress on the Land out of which the Rent issues.

Upon any part of the land, out of which the rent issues, a Distress may be made, either for a rent-service or rent-charge. (s) And if there be a house on the land, a Distress may be made in the house, if the outer door be open; or if the window be open, a Distress may be taken out at it. (t) And if the outer door be open, an inner door may be broke open for the purpose of taking a Distress. (u)

Yet at the commlaw, the lessor could not enter a house to distrain, if the door were not open, nor even a barn, nor throw down any gate or inclosure to get at a Distress. (x) But by the stat. 2 W. & M. c. 5. s. 3. any person having rent in arrear, is enabled to distrain sheaves or cocks of corn, or corn loose, or in the straw; or hay, lying in a barn or granary, or upon a hovel, stack or rick, or otherwise upon any part of the land, charged with the rent; to be afterwards disposed of, as directed by the statute. The language of this clause of the statute is very general, but it has been determined by Lord Hardwicke, that it does not authorize the distrainor to break open any pad locked barn or granary on the premises, in which corn, straw, or hay may be so deposited. (y)

(r) 1 Roll. Abr. 671. *Browning* v *Dann*, Rep. temp. Hardw. 168.
(s) Com. Dig. Distr. A. 3.
(t) 1 Roll. Abr. 671.
(u) *Anonymous*, Comb. 17.
(x) Co. Litt. 161. a.
(y) Vin. Abr. Distr. E. 2.

CHAP. VI.

Distress of Goods clandestinely removed.

In case the tenant's goods be clandestinely removed off the demised premises, in order to prevent a Distress; we have already seen, that by the 2nd section of the stat. 8 Anne, c. 14. the person to whom the rent is in arrear, is authorized to follow and distrain them within five days after such removal; which time is extended by the stat. 11 Geo. 2. c. 19. by the first and second section of which it is provided, that in case the tenant shall so remove his goods, the landlord may, within thirty days after such removal, take and seize them wherever they shall be found, as a Distress for the rent; unless before that time *bona fide* sold to a purchaser. And by the 7th section of the same statute it is enacted, that where any goods fraudulently or clandestinely carried away by any tenant or lessee, or their servant, agent, or other person aiding therein, shall be put in any house or other place, locked up or otherwise secured, so as to prevent such goods from being distrained for rent; the landlord or lessor, or his bailiff, may in the day time, with the assistance of the constable or other peace officer of the hundred parish or place, and in case of a dwelling house, oath being also first made before some justice of the peace, of a reasonable ground to suspect that such goods are therein; break open and enter into such house or place, and take and seize such goods for the arrears of rent; as he or they might have done by virtue of that or any other former act, if such goods had been put in any open field or place.

To bring a case within this statute, the removal must take place after the rent becomes due, and must be secret, not made in open day, for such a removal cannot be said to be clandestine, within the meaning of this statute, (*z*) nor does the act seem to apply to a removal of the goods of any other person than the tenant.

By the 8th section of the same statute, landlords are enabled to take as a Distress for rent, any cattle or stock belonging to their tenants, feeding upon any common appendant, or appurtenant to the premises demised.

(*z*) *Watson* v. *Main*, 3 Esp. Rep. 15.

CHAPTER VII.

Of a Distress for Services, Suit, Reliefs, and Customs.

THERE is perhaps no part of the law respecting the subjects of a Distress, which has undergone a more considerable change, than that which relates to the services due from the tenant to his lord. Under the ancient system of English tenures, these services and their several incidents were as numerous as they were oppressive. To the principal of them, namely tenure by knight-service, and grand serjeanty, not only homage and fealty were incident, but also aids, reliefs, primer seisin, wardships, marriage, fines for alienation and escheat. For the greater part of these the lord was entitled either to seize for a forfeiture, or to make a Distress: and our early writers on the Law of Distresses abound with inquiries into the various cases in which the lord was entitled to distrain for the subtraction of his tenant's services.

Of the Nature of the Ancient Services.

CHAP. VII.

Altered by several Statutes.

These inquiries, however, were gradually rendered less numerous and important by the operation of the statute of *Quia emptores Terrarum*, (*a*) and the statutes *de prærogativa Regis*; (*b*) which prevented the mesne lords, and tenants *in capite* from making subinfeudations of their lands. This necessarily limited the number and variety of legal services; but so many still remained due to the crown and to the lords of ancient seigniories, that the consideration of them formed a very important part of the law both of tenures and of Distress, until the reign of King Charles the second; when, by a single statute, (*c*) all the military tenures were entirely abolished, and converted into free and common socage.

By the stat. 12 Car. 2. c. 24.

By that statute it was enacted, that the court of wards and liveries, and all wardships, liveries, primer seisins, and ousterlemains, values and forfeitures of marriages should be taken away and discharged. And that all fines for alienations, seizures, and pardons for alienations, tenure by homages, and all charges incident to, or arising by reason of wardship, livery, primer seisin, or ousterlemain, or tenure by knight's service, escuage, and also aids for marrying the lord's daughter, and knighting his son, and all other charges incident thereunto, should be likewise taken away and discharged. And that all tenures by knight's ser-

(*a*) 18 Edw. 1. st. 2. c. 12. and 34 Ed. 3. c. 15.
(*b*) 17 Ed. 2. c. 6. 1 Ed. 3. (*c*) 12 Car. 2. c. 24.

vice in capite, or otherwise, and by socage in capite, and the fruits and consequences thereof, should be taken away and discharged: and all tenures of the king, or any other persons, be turned into free and common socage: (*d*) provided, that the act should not take away any rents certain, heriots, or suits of court belonging to any tenure taken away or altered thereby; or other services incident or belonging to common socage, or the fealty and Distresses incident thereunto. And that such relief should be paid in respect of such rents, as is paid in the case of the death of the tenant in common socage. And that it should not take away tenures in Frankalmoign, or subject them to any other or greater services, than they then were, nor alter or change any tenure by copy of court roll, or any services incident there-unto. Nor take away the honorary service of grand serjeanty. CHAP. VII.

The effect of this statute is therefore to reduce all freehold tenures, except tenure in Frankalmoign and by grand serjeanty, to tenure by free and common socage; but to preserve copyhold tenures, and their several incidents unimpaired. The tenures in Frankalmoign and by grand serjeanty have however since the statute become obsolete, and it will therefore only be necessary to inquire into the nature of those services which are

(*d*) Mr. Hargrave, note (1) on Co. Litt. 85. a. observes, that this statute descends into particulars with a redundancy of words. Indeed its redundancy is so great, as almost to obscure the sense of some of its clauses.

CHAP. VII. still incident to free and common socage, and to copyhold tenures.

Of Tenure in Socage.

Tenure in socage was formerly of two kinds, villein socage, and free socage. The former consisted of services that were certain, but of a base kind; the latter, of such as were both certain and honourable: and it is to this latter tenure of free and common socage, that the ancient military tenures are reduced by the statute. (*e*) But the nature even of the tenure by free and common socage is in some degree changed; for lands in socage might formerly be held by homage and various other services which are taken away by the statute of Charles 2nd. And as socage tenure itself is thereby reduced to that single species of it which is denominated free and common socage, in contradistinction to the villein socage, which consisted of baser services; all those predial services which formerly belonged to the latter tenure, are consequently taken away by the statute. So that, perhaps at this day, fealty, heriots and suit of court are the only services which can belong to socage tenure: the effect of the statute being not only to abolish all the other incidents of this tenure which then existed, but also to prevent the future reservation of any of those services which were taken away by the statute itself: for by the 4th section it expressly enacts, that tenures created by future

(*e*) 2 Bl. Comm. 61, 79, 81.

grants, even of the king, shall be deemed to be free and common socage only. CHAP. VII.

The fealty of socage tenure, and the Distress incident to it, are however expressly preserved by the 5th section; and to fealty a Distress is not only incident of common right, but absolutely inseparable from it, (*f*) unless by the act of law. (*g*) And the fealty itself is inseparable from the reversion. (*h*) Of Fealty.

Fealty is said to be incident to all manner of tenures, except tenure in Frankalmoign, and tenancy at will, unless of copyhold lands. So that if a man make a lease for life, or for years, without reserving any rent, the lessor having the reversion, the lessee shall do fealty to him; (*i*) for otherwise there would be no evidence of the tenure. (*k*)

But although fealty be thus incident to freehold, as well as copyhold tenure; the great revolution that has been effected by the abolition of the ancient military services, has rendered fealty nearly obsolete, except for copyhold lands: and even for them, it is generally respited on the admission of the tenant, there being sufficient evidence of the tenancy, in the entries on the court rolls of the manor. (*l*) The oath of fealty must however still be taken, if re-

(*f*) Co. Litt. 151. b.
(*g*) Id. 153. a.
(*h*) Id. 151. b.
(*i*) Litt. Sect. 131, 132.
(*k*) Id. Sect. 130.
(*l*) Watk. on Copyh. 1, 265.

CHAP. VII.

quired, by the tenant in person, although she be a feme covert, but it cannot be demanded of an infant tenant, for his nonage incapacitates him from taking the oath of fealty. (*m*)

The service of fealty generally ensues the nature of the tenant's estate. So that, among coparceners, the eldest only shall do fealty for herself and sisters: but it seems that joint-tenants shall do fealty jointly. Tenants in common, having several estates, must of course do for them several services. (*n*)

Of Heriots.

A second incident of tenure, preserved by the statute of 12 Car. 2. is that of Heriots. Of which, lord Gilbert says, that "it is now the best beast of the tenant; but anciently was taken out of the *militiæ apparatus*. It was a device first introduced to keep a conquered nation in subjection, and to support the public strength and military furniture of the kingdom, by taking on the death of the tenant, his best armour. Hence it became part of the services arising from the tenure, and therefore, to be distrained for as other services. This as the military service declined, was turned into something of private profit to the lord, and instead of the *militiæ apparatus*, he took the best horse, ox, or cow; and the same remedy was continued, as where the heriot was paid in the habi-

(*m*) Ibid. (*n*) Co. Litt. 67. a. b.

liaments of war." (*o*) Heriots may however consist of other things besides the cattle of the tenant, for any personal chattel, as a jewel or piece of plate, may be due to the lord for a heriot, according to the nature of the reservation. (*p*) CHAP. VII.

Heriots are of two kinds, heriot-service and heriot-custom. The former is due only in respect of a particular reservation, the latter is due to the lord by virtue of an immemorial custom established in a manor or other peculiar franchise; and does not require any reservation to support the lord's claim to it. Both the heriot-service and heriot-custom may belong equally to freehold or copyhold tenure; but our inquiries will be confined to heriot-service alone; for heriot-custom, although it may be seized, cannot be distrained for: (*q*) so that even a prescription to distrain for it, if it be eloigned, is bad. (*r*)

Heriot-service, is that heriot which is never due without special reservation: (*s*) and it was

(*o*) Gilb. Distr. 9, 10.

(*p*) 2 Bl. Comm. 442.

(*q*) Bro. Abr. Hariot, pl. 2, 6, 7. 2 Inst. 132. *Odiham* v. *Smith*, Cro. Eliz. 590. *Hungerford* v. *Haviland*, Latch. 38. S. C. 3 Bulst. 325.

(*r*) Bro. Abr. Hariot, pl. 9. It it indeed repeatedly said in the books, that heriot-custom can never be distrained for; but it should seem, that a Distress for it would be good, if there were also a custom for making the Distress. See what fell from Lord Hardwicke in *Rogers* v. *Birkmire*, Rep. temp. Hard. p. 247. And from Crew Chief Justice in *Hungerford* v. *Haviland*, 3 Bulstr. 325.

(*s*) Co. Copyh. 24.

CHAP. VII. anciently held, that such a reservation could be made only on the death of a tenant in fee-simple. (*t*) But this rule perhaps applied only to a tenure created before the statute of *Quia emptores Terrarum*; (*u*) for after that statute it was clearly otherwise; it being observed by Lord Coke, that heriots were *seldom* reserved upon a less estate than an estate of inheritance. (*x*) And it has since been held, that a heriot may be reserved on a lease for lives, or for years determinable on lives, and a Distress be made for it in respect of the reversion: but it seems that it should be so reserved as to become due before the expiration of the lease, for then the privity between the lessor and lessee is determined. (*y*) If it be reserved on a grant in fee made since the statute of *Quia emptores Terrarum*, it cannot be considered as a service, because no service can be created since that statute upon such a grant, but it is held to be in nature of a rent, and as such to be recovered by action or Distress, but not by seizure. (*z*)

I have already observed, that for heriot-custom the lord may seize, but cannot distrain; and for heriot-service, it was formerly held, that he might distrain, but could not seize. (*a*) It is however now determined, that for heriot-service, the lord

(*t*) Bro. Abr. Hariot, pl. 5. Lutw. 1368.
(*u*) Wms. note (1) on *Lanyon* v. *Carne*, 2 Saund. 168. a.
(*x*) Co. Copyh. p 24.
(*y*) *Osborne* v. *Sture*, 2 Lutw. 1368.
(*z*) *Edwards* v. *Mosely*, Willes, Rep. 192.
(*a*) 8 Hy. 7, 10. Bro. Hariot, 7.

may distrain, or seize at his election. (*b*) But the latter remedy can be resorted to, only in those cases in which the heriot can properly be considered as a service, rather than a rent; and therefore does not, as we have before seen, apply to any reservation upon a grant in fee since the statute of *Quia emptores Terrarum*: (*c*) but where the service is more ancient than the statute, it may of course be seized. As however the remedy of seizure does not immediately belong to our present inquiry, I shall only observe upon it, that on the death of the tenant, the heriot vests immediately in the lord, who may therefore seize it as his own property wherever it is to be found, even in the hands of a vendee; unless it were sold in market-overt: but he can seize the beast of no one but the tenant, and therefore cannot take one belonging even to an assignee of the lease. (*d*)

In some manors there is a custom for the commutation of the heriot into a sum of money: (*e*) but as this must be considered to be a heriot-custom, it is not distrainable. If however a sum of money be reserved in lieu of heriot-service, then

(*b*) *Woodland* v. *Mantel*, Plowd. 96. a. *Major* v. *Brandwood*, Cro. Car. 260. *Peter* v. *Knoll*, Cro. Eliz. 32. *Odiham* v. *Smith*, Id. 590.

(*c*) Ante, p. 146.

(*d*) Com. Dig. Copyhold, K. 20.

(*e*) Watk. on Copyholds, 2, 127.

CHAP. VII. it becomes a rent, and may be distrained for accordingly. (*f*)

As heriot-service is due only upon reservation, it depends wholly on the nature of the contract, and may be reserved on any event, or at any period. There are however some general rules which belong to such reservations. Thus where the heriot was reserved on the death of a tenant, if the tenant were disseised of freehold lands, the heriot would still be due on his death, and not on that of the disseisor, unless a descent were cast which tolled the entry of the lord: and then it would be due on the death of such disseisor, or his heir. And in copyhold lands, which do not admit of disseisin, if the surrenderor die before the admission of the surrenderee, it will be payable on the death of the former, because he dies tenant to the lord. (*g*) So, if the tenant be a female, and marry, it is due not on the death of the husband, but of the wife; but if she die in her husband's lifetime, the heriot is lost, for she cannot leave a personal chattel. (*h*) If the husband take as tenant by the curtesy, or a woman by free bench, the whole of the copyhold, then heriots are due on their respective deaths as tenants. (*i*) And as joint-tenants and coparceners make but one tenant to the lord,

(*f*) *Lanyon* v. *Carne*, 2 Saund. 165.

(g) Watk. on Cop. 2, 146. 147.

(*h*) Id. 151. and see *Shaw* v. *Taylor*, Hob. 176.

(*i*) Watk. 152, 153.

the heriot is not due until the death of the survivor; but among tenants in common who have several estates, it is due on the death of each. (*k*)

As a heriot is due in respect of the tenancy of land, where the legal estate in the lands holden is vested in a trustee, the heriot is due on his death, and not on that of the *Cestui que trust.* (*l*)

Where the heriot is reserved upon alienation, it must of course depend upon the description of the alienation of the deed: but I agree with a learned writer in thinking, that it must generally be taken to mean, such an alienation as not only changes the possession, but determines the tenancy: and therefore, that where reserved upon a grant in fee of freehold lands, it will not be due upon aliening only a portion of the fee, which does not destroy the original tenancy. Although it is otherwise in copyholds, where the alienee becomes tenant, not to the alienor, but to the lord. (*m*)

Heriot-service, like rent, is incident to the reversion; and therefore, will descend with the reversion to the heir, or pass with it to a grantee. (*n*) Thus, where a lease of part of a manor was made to A. and B. for lives, rendering rent, and a heriot

(*k*) Id. 147—149.

(*l*) *Trinity College Cambridge* v. *Browne*, 1 Vern. 441.

(*m*) See Watk. 156—158.

(*n*) *Lanyon* v. *Carne*, 2 Saund. 166.

CHAP. VII. reserved upon the death of each of the *Cestui que vies*; and afterwards the manor was leased for years, and the lessor died, it was held, that the heriot should go along with the reversion, (or as it should rather be termed the possibility of reverter) to the lessee of the manor. (*o*) Where a heriot is reserved upon a lease for years, it does not become due unless the lease has taken effect in possession; and therefore, when reserved upon a second lease, to commence after the determination of a former one, before which the lessee in the second lease on whose death the heriot was payable, died, it was determined by the opinions of three justices, that it was not due. (*p*)

Heriot-service may, in some cases, be multiplied, and in others be extinguished. For it is considered to be like an entire rent, as the render of a horse or sword, where, if the tenant alien a part of the lands demised, the rent shall be multiplied, and paid for each part: (*q*) therefore, if there be three or four alienees of land held by heriot-service, a heriot will be due on the death of each: and after the tenant has, by his own act, multiplied the services, he cannot afterwards reduce them; for if he purchase back the part of the land which he aliened, the multiplied services will still continue. (*r*)

(*o*) *Bishop of Gloucester* v. *Wood*, Winch, 47. S. C. Id. 57.

(*p*) *Lanyon* v. *Carne*, 2 Saund. 165.

(*q*) *Bruerton's* Case, 6 Rep. 1. *Talbot's* Case, 8 do. 105.

(*r*) Ibid.

But, as the act of the tenant may multiply the services, so the act of the lord may extinguish them, as by an unity of possession; for if the lord purchase even a part of the land, the whole service is thereby extinct. And if the whole land come to the lord by descent, or by escheat; there the service will also be extinct; because the tenancy is at an end: but, if a part of the land come to the lord, by the mere act of law, it should seem, that in that case, the service will remain for the residue. (*s*)

If the heriot be not rendered to the lord, or be eloigned, he may distrain for it, not only the goods of the tenant, but even those of a stranger, if within the manor: but he cannot out of the manor, distrain the goods even of the tenant himself. (*t*)

A Distress for heriot-service, like a Distress for rent, must be confined to that which is due upon a single reservation. And therefore, if a tenant hold two parcels of land, upon which heriots are *severally* reserved, although both reservations may be contained in one deed, a joint Distrees for both the heriots could not be supported. (*u*)

When a Distress was made for a heriot, the dis-

(*s*) Ibid.

(*t*) *Woodland* v. *Mantel*, Plowd. 96. *Austin* v. *Bennet*, 1 Salk. 356. *Major* v. *Brandwood*, Cro. Car. 260.

(*u*) See *Syliard*'s Case, reported in 1 Bulstr. 101. as cited and observed upon by Lord Hardwicke in *Rogers* v. *Birkmire*. Rep. temp. Hardw. 247.

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trainor was entitled, at the common law, to detain the cattle or goods until the heriot was paid, or the Distress replevied. And now as it should seem, in all cases where the heriot is considered to be *a rent, rather than a service,* the Distress, if not replevied, may be sold under the authority of the act of 2 Wm. & Mary, c. 5, (*x*) but where the heriot is properly *a service,* it cannot fall within the operation of that statute.

Suit of Court.

A third incident of tenure preserved by the statute of Charles 2nd, is that of Suit of Court. This is of two kinds, namely, suit-real and suit-service. The first is by common law and of common right, being the attendance which persons owe to the court-leet, or the county court, to which they are obliged in respect of their commorancy within its jurisdiction. For this service, if neglected, the defaulter is liable to be punished by fine or amerciament, which may be levied by Distress. But the consideration of this species of Distress belongs to a future part of our inquiry. The other, namely, suit-service, is that attendance which is due to the court-baron by the freehold tenants of a manor; and to the customary court, by its copyhold tenants; in order to form the jury, or as it is termed, the homage of those courts. For the neglect of these services, the lord is entitled to distrain on the goods of the tenant who makes default. (*y*)

(*x*) Wms. note (1) on *Lanyon* v. *Carne,* 2 Saund. 168. a.

(*y*) *Anonymous,* 3 Salk. 332.

To the court-baron, which consists of the freeholders of the manor, every freehold tenant is bound to do suit. But this duty must be shewn, either by the terms of the feoffment, or by prescription which is the presumptive evidence of it: for otherwise, the tenant cannot be distrained for his suit. (*z*) Anciently, the freeholder was compellable to do this suit in person; but this was productive of great inconvenience, for he might be tenant of different manors, holding courts on the same day; (*a*) and it was therefore enacted, by the statute of Merton, that every freeman oweing suit to the country, trything, hundred and Wapentake, or to the court of his lord, might make his attorney to do those suits for him. (*b*) This authority must be given by power of attorney under seal, to be allowed by the steward of the court: and when duly authorized, such attorney may, in general, perform all the suit-service of the freeholder in the court-baron, except that of sitting there as a juror on the homage: (*c*) which restriction also extends to a female tenant, who may be a freeholder, but cannot sit as a juror in the court. (*d*) If however she marry, her husband must sit on the homage in her stead. (*e*)

(*z*) Stat. Marlbr. 52. H. 3. c. 9.
(*a*) 2 Instit. 99.
(*b*) Stat. 20 Hy. 3. c. 10.
(*c*) 2 Inst. 99, 100. S. V. *Hunt* v. *Bourne*, 1 Salk 341.
(*d*) 2 Instit. 119.
(*e*) Watk. on Copyh. 1 p. 273.

CHAP. VII. The statute of Marlebridge, cap. 9. provides for the suit that shall be done by some persons holding joint estates; and enacts, that "if any inheritance whereof but one suit is due, descend "unto many heirs, as unto parceners, whoso hath "the eldest part of the inheritance, shall do that "one suit for himself, and his fellows, and the "other co-heirs shall be contributaries according "to their portion, for doing such suit. And if "many feoffees be seised of an inheritance, whereof "but one suit is due, the lord of the fee shall have "but one suit."

With respect to parceners, Lord Coke observes, that the act is to be understood, after partition, for before that time, the eldest hath not *enitiam partem;* and before partition, no contribution can be made. But in the king's case, all the coparceners must do suit, as well after partition as before, and so must their several feoffees; for the act extends not to the king. And in the case of a common person, if the eldest will not do the suit, the lord may distrain the other coparceners. (*f*) If one coparcener make a feoffment of her part, or a man be tenant by the curtesy of one part of the land, yet one suit shall only be done by the elder coparcener. (*g*) So if one by a feoffee or tenant by the curtesy of the *enitia pars*, he shall do the suit alone. (*h*) But if a joint-tenant make a feoff-

(*f*) 2 Instit. 119.
(*g*) F. N. B. 159.
(*h*) 2 Instit. 119.

ment of his part, his feoffee shall do a several suit by himself; although the other joint-tenants shall do but one suit by the statute of Marlebridge. Tenants in common are however bound to do several services and several suits. (*i*)

The statute of Marlebridge extends only to those cases of joint estates, in which the tenant doing the whole suit may have contribution from his co-tenants; and therefore, if one holding by suit made several feoffments of different parts of the land, by the operation of the statute the lord was entitled to suit only from one of the tenants, and the others were bound to make contribution: (*k*) but if the tenant enfeoffed several persons *jointly*, of different parts of the land, in this case no contribution was required, for only one suit was due from all the joint feoffees. (*l*)

Suit of court may be due not only from the original tenant of the land, but also from his widow holding in dower, but she cannot be distrained to do such suit for her land, if the heir have sufficient land in the county for the Distress. And if the tenant in dower be distrained, she may have a writ *de exoneratione Sectæ.* (*m*)

Suit of court, like other services, may be extin-

(*i*) F. N. B. 162.
(*k*) *Bruerton's* Case, 6 Rep. 1.
(*l*) Ibid.
(*m*) F. N. B. 159.

CHAP. VII. tinguished by the act of the lord. So that, if the lord purchase any part of the land, the whole suit is gone: and so it is, if such part come to the lord even by act of law, as by descent, because in that case there wants contribution, as much as if it came to him by act of the party. (*n*)

As the king cannot hold land of a subject, no suit or service can ever be due for land in the hands of the king, or of his grantees. And therefore, if the king have lands by forfeiture, or escheat, and lease them for life, or at will, or grant them in tail, the lord cannot distrain the king's lessee or grantee. And so it was anciently of the lands of an heir in the wardship of the king, whether the lands were in the hands of the king, or of his committee. (*o*) For by the seisin of the king it seems that the services are not merely suspended, but destroyed: and therefore, if a man hold land charged with suit to the hundred by prescription, and enfeoff the king of parcel of the land, Lord Hale doubts whether the whole suit be not thereby extinguished. (*p*)

Of the Customary Court. As the court-baron is composed of the freeholders of the manor, so is the customary court of the copyhold tenants; who upon due notice being given to them of holding the court, are obliged to

(*n*) *Bruerton's* Case, 6 Rep. 2.
(*o*) F. N. B. 158, 159.
(*p*) Note (*d*) ibid.

attend, although they may not be resident within the manor. (*q*) And as all the copyholders are bound to attend, a woman copyholder must do suit, if she be sole, or a widow: but if under coverture, her husband must perform it for her. So a widow must do suit for her freebench, and the husband for his curtesy. But it should seem, that an infant shall not do suit, for he cannot do it in person; and it does not appear that he can perform it by guardian. (*r*) As copyholders are not within the statute of Marlebridge, they cannot perform their service by attorney, but they may make as essoign as *de malo lecti*, if unable to attend. (*s*)

This suit, like other services, follows the nature of the tenant's estate: and therefore, among coparceners, or joint-tenants, one shall do suit for all; but tenants in common shall do several suits for their land. (*t*)

There is another species of suit-service, which was anciently very general, and has not yet become obsolete; which is, an obligation on the part of the freehold and customary tenants of a manor, to grind their corn at the lord's mill. For the subtraction of this service, there are two remedies; the one, by the writ of *Secta ad Molendinum*, the

(*q*) *Sir John Braunche's* Case, 1 Leon. 104. p. 174, 175.
(*r*) Watk. Copyh. Vol. 2.
(*s*) 1 Leon. 104. *ut supra.*
(*t*) Vide ante, p. 144.

other, by Distress. This suit may be claimed either by prescription, or tenure: and therefore, it was formerly held, that a man might claim it by prescription, even from the villeins of a stranger. (*u*) And in the case of the king, it is said, that if he hold a manor even by wardship, within which there is a mill, all the tenants are bound to grind their corn at it; although not otherwise bound to do so by tenure or prescription. (*x*) Where this suit is due from tenants, it should be claimed in respect of their tenure, but where claimed from resiants, it must be prescribed for. (*y*)

Of other Copyhold Services.

Anciently, it was usual for copyholders, as well as freeholders, to perform various corporal services, as ploughing the lord's land, &c. and such services, if belonging to copyhold tenure, are preserved by that clause of the stat. 12. Car. 2. which generally exempts copyholds from the operation of the act. But time has nearly abolished, what in this respect the statute has preserved; for there are now very few instances of performing such services even for copyhold lands. In some places however, it is said, that the tenants still assemble with their teams, &c. on certain days which are usually called boon, or due days; but the ceremony is chiefly formal. Where such services are still really due, Distress is incident to them, as to other copyhold services. (*z*)

(*u*) F. N. B. 122.
(*x*) Hale, note (*b*) ibid.
(*y*) Id. note (*c*) ibid.
(*z*) Watk. Copyh. 2, 184.

Another incident of tenure preserved by the stat. 12. car. 2. is that of relief. For, although the reliefs due upon the ancient military tenures, were by that statute abolished, together with the tenures to which they belonged: yet the 5th clause which exempts from the operation of the act rents certain, heriots and suits of court, also provides that such relief shall be paid in respect of those rents as is paid on the death of the tenant in common socage. Upon this part of the statute, one of the learned Editors of the first institute, Mr. Hargrave, makes the following remarks: "From this clause "it seems that there can be no relief out of lands "which the statute changed into socage, unless "where a quit rent is also payable; and the rea- "son of thus expressing the act will appear by "considering, that a year's rent is the relief for "lands holden by common socage, and conse- "quently is never due out of lands which are not "subject to a rent, unless by special custom, or "express reservation." (*a*) And afterwards, upon that passage, in which Lord Coke observes, that where the tenure is by fealty only, no relief is due, Mr. Hargrave says, "The reason is plain: socage "relief being a year's rent, cannot be calculated, "if annual rent is not payable. See ante 85. a. "note 1. But, as by custom, or by express re- "servation on creating the tenure, a payment "wholly different from, and unconnected with the

(*a*) Note (1) on Co. Litt. 85. a.

CHAP. VII. "yearly rent, may be due for relief; so it may be "presumed, that by the same means, a relief may "be payable where there is no yearly rent; be- "cause the relief is ascertained, without reference "to a yearly rent, in both cases equally. See "Kitch. on Co. ed. 1592. s. 103. Here, it may "not be amiss to advert to some other differences "between the several kinds of relief payable by "socage tenants. 1st, The proper socage relief "that is the relief incident to the tenure by socage, "by the general custom of the realm, is a year's "rent, and consequently, can never be payable, "except where there is an annual rent; but the "improper socage relief, that is, the relief due "either by special custom, or by express reserva- "tion, may be more or less than the annual rent, "or may be payable where there is no annual rent. "2ndly, The socage relief by common law is only "payable on a descent, and by a natural person; "but the two other reliefs may be due where the "tenant comes in by purchase, or where he takes "as a sole corporation by succession. Ante 84. a. "2 Ro. Abr. 517, 518. 3rdly. If the relief "claimed, is one at common law, it is presumed "to be due till the contrary appears; that is, un- "less it can be proved, that the relief hath been "released, or that the tenure was reserved with "an express exemption from relief. 8 Lev. 145. "Vin. Abr. Evidence, A. b. 28. pl. 5. But if the "relief be claimed by special custom, or special "reservation, the *onus probandi* must necessarily

" fall upon the lord. 4th. If the relief is by the " common law, it is merely a fruit incident to the " service; but if the relief is by express reserva- " tion, it is a part of the service. 5th. If the relief " is by the common law, or by special reservation, " the remedy by Distress follows of course; but " it is said, that for relief by special custom, Dis- " tress is not warranted without a prescription. " W. Jo. 199." (*b*)

To this concise but comprehensive view of the doctrine of socage relief, I shall add but a few observations.

The resemblance of the relief to the heriot is so striking, that they have been frequently confounded together; although in fact they differed essentially; the heriot being generally due on the death of the tenant, or on the determination of the tenancy; the relief only on the accession of the heir. (*c*) And it was therefore a rule of the common law, (as above stated) that a purchasor should never pay a relief. So that, if a man aliened in fee to his eldest son, and died, his son being of age, no relief was due from him, because he took by purchase: (*d*) but if it had been a gift in tail, and the reversion had descended, he should have paid

(*b*) Harg. note (2) on Co. Litt. 93. a. 128. and Harg. note (1) on Co. Litt. 83. a.

(*c*) Watk. on Copyh. 2, (*d*) Roll. Abr. 2, 517.

CHAP. VII. a relief in respect of the reversion. The relief was in general considered as being due upon the accession of every heir, and therefore was due from the female, as well as the male heir.

If a tenant in socage hold, at his election, either by the render of a horse or twenty shillings rent, he may pay which he pleases for a relief: but if he neglect to render either of them, then the lord may distrain for which of them he will. If however the render is uncertain in value, as if the tenure be to attend on his lord, or to pay ten shillings, there the relief must be the ten shillings: because the value of the other service cannot be ascertained. (*e*) If the rent be reserved, not annually, but every two or three years, still the whole amount of it is due for the relief. And as at the common law, the lord could not have the wardship of the body or land of the heir of socage tenure, the relief is considered to be due immediately on the death of the ancestor, and the lord may at once distrain for it. (*f*) In the case of joint inheritances, as in estates in coparcenary, only one relief is due on the accession of the joint heirs. (*g*)

Lastly, It is the opinion of Lord Coke, that for a relief the lord may distrain, but cannot have an action of debt: and that his executors and admi-

(*e*) Co. Litt. 90. a.
(*f*) Id. 91. a.
(*g*) *Anonymous*, 3 Leon. 13.

nistrators may have an action of debt for it, but cannot distrain. (*h*) CHAP. VII.

Of the Seisin of Services.

It has been before observed, that at the common law, a seisin both of rents and services was necessary to entitle the lord to distrain for them. And that the stat. 32 Hen. 8. c. 2. rendered it necessary to allege such seisin within fifty years; but the stat. 11 Geo. 2. c. 19. s. 22. which enables the lord distraining to avow generally without setting forth the grant, tenure, demise or title, extends not only to rents, but to services, heriots and reliefs. (*i*) And as this statute has been considered to have been made for the purpose of preventing tenants from contesting the titles of those under whom they hold, (*k*) it should seem that since that act, it is not competent for a tenant to dispute the seisin of his landlord distraining for any species of reliefs or services.

Customs.

There are various customs in respect of which a Distress may be made. The greater part of these belongs to manors and copyhold lands; but whether belonging to freehold or copyhold tenure, no custom can be sufficient to support a Distress, unless it

(*h*) Co. Litt. 47. b. 83. a. Sed vide Lord *North*'s Case, 2 Leon. 179. and *Hungerford* v. *Haviland*, 2 Roll. Rep. 371.

(*i*) Reliefs are mentioned in this statute, but they certainly were not within the statute of Henry 8. See 2 Inst. 95.

(*k*) *Syllivan* v. *Stradling*, 2 Wils. 208.

possess all the legal qualities essential to a good custom. And therefore, the great question to be considered in all cases is, whether the custom upon which the Distress is founded, be a good custom according to those principles of law which determine the validity of customs in general. But as it would greatly exceed the limits of this work, to inquire minutely into the law of customs, I shall only mention the general legal requisites of a custom, and afterwards take notice of a few cases respecting them, which more immediately relate to the Law of Distresses.

First. A custom must be immemorial. 2ndly. It must have been continual, that is, continued without interruption with respect to the right, although there may have been cessations in the exercise of it. 3dly. It must be peaceable, that is, so commonly acquiesced in, that its existence may appear to have have been generally admitted. 4thly. It must be reasonable, that is, agreeable to that artificial rule of reason, which may be deduced from the general principles of the law. 5thly. It must be certain, that is, certain and defined in itself, or capable of being reduced to such certainty, by a reference to something by which it may be ascertained. 6thly. It must be compulsory, that is, so fixed and established with respect to the right, as not to be left to the option of those who are subject to it.(*f*)

(*f*) Bl. Comm. V. 1. 76—8.

As every custom depends upon an immemorial usage, it is a necessary consequence, that customs which are repugnant to each other, cannot be good: for inconsistent usages destroy each other's prescription: but where customs are not inconsistent, it is sufficient that they be immemorial, although they may not be coeval. (*m*) CHAP. VII.

It is also a general rule, that all customs must be subject to the prerogative of the crown, and every custom inconsistent with it, is therefore void, at least with respect to the king. (*n*)

Where a custom is repugnant to law, it is absolutely void; where it is in derogation of the common law, it is construed strictly; and even where the custom may be good as between the parties, it is not permitted to alter or destroy the rights of other persons, who are strangers to it. Thus, a custom that the lord may seize as a heriot, the best beast of every person dying within his manor, that may be found there, is void. For as between the lord and a stranger, such a custom could not have a lawful commencement; but as between the lord and his tenants, such a custom may be good. So, if the lord prescribe to have forty shillings of every stranger who breaks his pound, such a prescription is void, and binds his tenants only. But

(*m*) *Lovelace's* Case, 1 Salk. 208.

(*n*) The Case of *Tanistry*, Dav. Rep. 33. b.

CHAP. VII. possess all the legal qualities essential to a good custom. And therefore, the great question to be considered in all cases is, whether the custom upon which the Distress is founded, be a good custom according to those principles of law which determine the validity of customs in general. But as it would greatly exceed the limits of this work, to inquire minutely into the law of customs, I shall only mention the general legal requisites of a custom, and afterwards take notice of a few cases respecting them, which more immediately relate to the Law of Distresses.

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(*m*) *Lovelace's* Case, 1 Salk. 208.

(*n*) The Case of *Tanistry*, Dav. Rep. 33. b.

CHAP. VII. a prescription to have the beasts of a stranger, which are lying upon his land all the day, to fold upon his land in the night, is good: because in this case, the stranger has a compensation. (*o*) So a custom for a township to send a constable to be sworn at the leet of the lord of a manor, or be fined, may be good; but as it is against common right, a Distress cannot be made for it without a custom to support it. (*p*) So a custom in a manor for all the copyholders living remote from it, to pay a certain sum in excuse for doing suit there, was held to be good: for here as custom gives the suit, it may consequently qualify it. (*q*)

But even as between the lord and his tenants, a custom must have those general legal requisites, which belong to a good custom. And therefore, a custom that no commoner shall put his cattle upon the waste, before the lord, is void: because it leaves it to the will of the lord, whether the commoner shall ever enjoy his common, or not. (*r*) So is a custom that every tenant who marries his daughter without the licence of the lord, shall pay a fine. (*s*) Or a custom, that the lord may detain a Distress taken upon the demesnes of the manor, until a fine at his will be paid for the damage: (*t*) for both these customs are unreasona-

(*o*) *Parker* v. *Combleford*, Cro. Eliz. 725.
(*p*) *Pierson* v. *Ridge*, 1 Ventr. 105.
(*q*) *Isaac* v. *Ledgingham*, 1 Ventr. 167.
(*r*) The Case of *Tanistry*, Dav. Rep. 32.
(*s*) Litt. Sect. 209.
(*t*) Dav. R. 33. ut supra.

ble. And upon the same principle, a custom for the homage to assess a compensation, in lieu of a heriot due from an incoming tenant, was in a recent case held to be bad; as being made by persons interested, and without a rule to ascertain the assessment. (*u*)

Those customs are favoured, which are beneficial to the public; such for instance, as tend to promote trade or navigation. And therefore, a custom for a corporation to distrain the tackle of a ship, for the non-payment of toll due to them in consideration of repairing a port, is good. (*x*) And it was also said to be a good custom within a manor adjoining to the sea, that in case of a wreck, cast upon the manor between the flux and reflux of the sea, in consideration of the lord's taking care of the sick, and of the goods, he should have the best anchor and cable of the ship. (*y*) But where the custom was for the lord to have such anchor and cable of any ship that should strike upon the shore of the manor, and afterwards get off, it was determined to be void, for there was no proportion between the damage and the recompence. (*z*)

(*u*) *Parkin* v. *Radcliffe*, 1 Bos. & Pull. 282.

(*x*) *Vinkinstone* v. *Elden*, Carth. 357. *Mayor and Commonalty of London* v. *Hunt*, 3 Lev. 37.

(*y*) *Simpson* v. *Bithwood*, 3 Lev. 307.

(*z*) *Geere* v. *Burkensham*, 3 Lev. 85.

CHAPTER VIII.

Of a Distress for Fines and Amerciaments.

THE imposition of fines for acts of contempt or disobedience, is incident to a variety of courts. And such fines are recoverable according to their different natures, by *capiatur*, *levari*, or Distress. I shall however principally confine my inquiries to such as are usually recovered by Distress. And therefore shall pass over, among others, copyhold fines paid on alienation or descent; for which an action of assumpsit will lie, but which cannot be distrained for, because they are only a debt due from the person of the tenant upon admittance, and not a charge upon the land. (*a*)

Fines imposed in the Tourn or Leet.

The fines for which a Distress is most usually made, are those imposed in the sheriff's tourn, or

(*a*) Watk. on Copyh. 1, 321.

the court leet. "There is however (says the Lord Chief Baron Gilbert) this distinction to be observed in fines imposed by a court leet. They are either imposed by a steward for a contempt to the court; and this is absolutely necessary for the support of the authority and dignity of the court, within the boundaries of its duty: or else, they are imposed as a punishment for those crimes which are conusable by the court. But where by custom the court hath jurisdiction to impose a fine for a thing not originally within the jurisdiction, but only acquired by custom, in such case, as that particular custom gave the leet a power to impose the fine, so the custom only can create the right of Distress." (*b*) And therefore it is said, "That a Distress is incident of common right to every fine and amerciament in a sheriff's tourn or court leet; whether the same belong to the king, or a subject, if the offence for which they were imposed be of common right incident to the jurisdiction of such courts: but if such offence were only the neglect of a duty created by custom; it is questionable, whether it do not require the like custom for a Distress, though the duty be of a public nature; but if it be for the private benefit of a subject, it seems clear, that no Distress is incident to it, without a special custom." (*c*) CHAP. VIII

(*b*) Gilb. on Distr. p. 18. (*c*) 2 Hawk. P. C. 60.

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Difference between Fines and Amerciaments.

It is however necessary to distinguish fines from amerciaments, with which they are often confounded. For although an amerciament, as well as a fine, is said to be the act of the court; yet it is the act of the court by the intervention of the jury; whereas, a fine properly so called, is the act of the court alone.

It is observed by Lord Coke, that fines are usually imposed on strangers, but amerciaments upon the officers or suitors of the court: (*d*) the principal distinction between them however, seems to be, that fines are usually imposed for offences within the view of the court, and amerciaments for offences committed out of it. (*e*)

With respect to the power of imposing such fines or amerciaments, it is held, that if any contempt or disturbance to the court be committed in any court of record, the judges may set upon the offender a reasonable fine. Now a leet being a court of record, and the steward a judge there; if any contempt or disturbance tothe court be made before him, he may set a reasonable fine upon the offenders. Thus if the bailiff of a leet refuse in court to execute his office, or a tithingman refuse to make a presentment in a leet, the steward shall set a reasonable fine upon him. So if

(*d*) *Griesley's* Case, 8 Rep. 40. b. (*e*) Id. 41. a.

one of the jurors in a leet depart without giving his verdict, or a constable refuse to take his oath of office, he shall be fined by the steward. (*f*) But for an offence done out of court, as not coming to do suit there, the steward cannot fine. (*g*) If however there be a custom in a manor, for the steward to assess a fine, for such default of suit or service, and also a prescription in the lord to distrain for such fine so assessed; it should seem, that the Distress would be good; but without such custom and prescription, the Distress could not be supported. (*h*)

The same observation applies to a Distress *pro certo letæ;* for although this is due to the lord on account of his purchase of a leet for the ease of his tenants, (*i*) yet this payment of it is only an advantage to the lord, without being necessary to the jurisdiction of the court; and therefore he must prescribe for a Distress. (*k*)

It is essential to the validity of every fine, that it be moderate, for where it is excessive, it is deemed to be unlawful and not binding. And it is said that the reasonableness of a fine is a question

(*f*) Id. 38. b. *The Earl of Lincoln* v. *Fisher,* Cro. Eliz. 581. S. C. Moore, 470.

(*g*) *Hall* v. *Turbott,* Cro. Eliz. 241.

(*h*) *Pierson* v. *Ridge,* 1 Ventr. 105.

(*i*) 2 Inst. 71.

(*k*) *Godfrey's* Case, 11 Rep. 44. b. S. C. 1 Roll. Rep. 75, 33.

CHAP. VIII.

to be determined by the king's justices. So that, if the fines of a manor are uncertain, yet the lord cannot demand excessive or unreasonable fines; if he do, the copyholders may refuse to pay them: and the question of their reasonableness shall then be determined by the king's justices. For, says Lord Coke, *Quam rationabilis debet esse Finis non definitur, sed omnibus circumstantiis inspectis, pendet ex justiciariorum discretione.* (*l*)

Where several persons are guilty of one offence, they should not be jointly, but severally fined: for as a fine is commonly imposed not for any general neglect of duty, but for a particular and personal misfeasance, it belongs to the very nature of the offence, that its punishment should be confined to the individual who is guilty of it. And therefore, if the jurors of a leet refuse to be sworn or to make a presentment, and the steward fine them jointly, it is void.

For non-attendance in the Leet.

The most usual cause for which an Amerciament and Distress are made under the authority of a court leet, is, for non-attendance to do suit, or be sworn there. For this is a duty attaching on all persons above the age of twelve years, resiants within the jurisdiction of the leet; except ecclesiastical persons, women, and peers of the realm; (*m*)

(*l*) Ut supra. 11 Rep. 43. 99, 121.
(*m*) Co. Litt. 68. b. 2 Inst.

from which no one can claim to be discharged, even by an express grant of exemption from the king. So that, where the tenant of a lord was summoned to the leet, and for non-attendance amerced, and distrained upon; and to the lord's avowry, the tenant pleaded in bar, that his lands were formerly parcel of a monastery held in Frankalmoign, and as such discharged from all secular services, and were granted by the crown to his ancestor, to hold to him and his heirs, as fully and freely as they were held in Frankalmoign, it was determined, that such grant was no discharge from the duty of attending the lord's leet: for it was said, that although the king may discharge a subject from attending at his own court or sheriff's tourn, yet he cannot grant such a discharge to the prejudice of the private leet of the lord. (*n*) CHAP. VIII.

Suit at a court leet is not within the provision of the statute of Marlebridge; (*o*) and therefore cannot be done by attorney; for in this respect, it is considered a species of suit real, which must be performed in person. (*p*) And as this suit is in respect of resiancy within a jurisdiction, it must always be performed in that leet within which the suitor is commorant. So that, if a man have two houses in different hundreds, he must do his suit in the leet of that hundred in which he most usually resides.

(*n*) *Dacre* v. *Nixon*, 2 Roll. Rep. 56.

(*o*) See ante, p. 154.

(*p*) 2 Inst. 99.

CHAP. VIII. And if he live in a house situate in two hundreds, he must attend the leet of that hundred in which he sleeps. (*q*)

Amerciaments, as I have already observed, differ from fines in several respects; and being generally imposed rather for a breach of duty, than the commission of any flagrant offence, have been considered as penalties, *pro minoribus delictis.*

Such amerciaments may be made by the jury either of a court baron, or court leet: but for those made in the former, it seems to be settled, that the lord cannot distrain without a prescriptive right, (*r*) although it is said to be otherwise in the case of the king. (*s*)

Amerciaments may be found by the jury of the court leet, for all offences cognizable within it. As for not doing suit, or for committing a nuisance, or not paying the *certum letæ*, or for a contempt of the court, although it might otherwise be punished by fine. (*t*) But the leet cannot amerce for non-payment of rent to the lord, for he may at once distrain for it: nor for encroaching on the waste, or building a cottage. (*u*) For the court leet can amerce for none but public nuisances;

(*q*) 2 Inst. 122.
(*r*) *Godfrey's* Case, 11 Rep. 45. a. Dr. and Stud. Dial. 2. ch. 9.
(*s*) *Rowleston* v. *Alman*, Cro. Eliz. 748.
(*t*) Com. Dig. Leet. O. 1.
(*u*) Ibid.

and not for a particular trespass to the lord or any other person, for which an action lies by them to recover damages: (*x*) nor can such an amerciament be supported even by custom. (*y*) CHAP. VIII.

To authorise an amerciament, a presentment of the offence should be made by the jury of a court leet; which jury should, by the common law, consist of twelve men. (*z*) And although there be in some manors a custom for presentments to be made by a smaller number, as in the manor of St. Giles, Bloomsbury, to make presentments respecting weights by six aleconners; it seems very doubtful, whether such a custom be good. (*a*) For presentments partaking of the nature of criminal proceedings, the law regards him with a jealous eye; and it has therefore been decided, that a custom to swear the jurors at one court leet, to inquire and return their presentments at the next court, is bad in law. (*b*) The jurors making the presentment should be not only tenants of the manor, but also resiants within it; for the duty to attend the leet is a personal service in respect of commorancy, and not of tenure. (*c*)

(*x*) *Rex* v. *Dickenson*, 1 Saund. 135. *Blunt* v. *Whitacre*, 1 Leon. 242.

(*y*) *Wood* v. *Lovatt*, 6 T.R. 511.

(*z*) Vide Mag. Chart. c. 14. Rast. Entr. 606.

(*a*) *Duke of Bedford* v. *Alcock*, 1 Wils. 248.

(*b*) *Davidson* v. *Moscrop*, 2 East. 55.

(*c*) Id. 60. and the authorities there cited.

CHAP. VIII. When a presentment has been duly made, it is the duty of the jury to make the amerciament. And therefore, if it be made by the lord himself, or his steward, it is bad, though made by custom: for nothing less than prescription can support a claim so much against common right. (*d*)

An amerciament, like a fine, must not be excessive: for Magna Charta (*e*) itself provides, that no freeman shall be amerced *pro parvo delicto, nisi secundum modum ipsius delicti; et pro magno delicto, secundum magnitudinum delicti, salvo contenemento suo, &c.* (*f*)

Of Affeerment. It is therefore essential to the validity of an amerciament, that it be reasonable and moderate. And in order to determine what shall be deemed a moderate amerciament, it is in some cases necessary, not only that the amerciament should be found by the jury, instead of the court; but that its amount should afterwards be mitigated, and assessed by a kind of second jury, composed of persons called affeerors, (*g*) who are chosen in court to affeer the amerciament. These affeerors are two in number, (*h*) and, like the jurors of the court, should be persons resiants within its jurisdiction, and owing suit therein. And therefore,

(*d*) *Blunt* v. *Whitacre*, 1 Leon. 242.
(*e*) Ch. 14.
(*f*) See this explained by Fitzh. N. B. 75. and Barrington, 10.
(*g*) F. N. B. 75.
(*h*) *Matthews* v. *Cary*, 1 Show. 62.

where an action of debt was brought for an amerciament made in a court baron, which was affeered by persons who were not freehold tenants, or free suitors of the manor; (*i*) the court held that the amerciament was bad, for they said, it ought to have been affeered *per pares de vicineto;* and that no persons could be such *pares*, but those who were freehold tenants of the same manor. (*k*)

This affeerment was formerly thought necessary in all cases of amerciaments. So that, where, in an action of trespass, the defendant justified under a presentment in the leet, whereon the plaintiff was amerced, and the amerciament affeered to ten shillings, Lord Hobart held that the plea was bad; because it stated generally that the plaintiff was amerced, and that it was afterwards affeered to ten shillings, without shewing in what sum the amerciament was first made. (*l*) And the same point was ruled in another case, where in an action of debt for an amerciament in a court leet, the declaration stated, that the defendant was presented and amerced, *which said amerciament was affeered by all the jurors to forty shillings*, without shewing a separate affeerment; for this cause, the declaration was held bad on general demurrer. (*m*)

(*i*) See note (2) in *Chetwood* v. *Crewe*, Willes, Rep. 619.

(*k*) *Baldwin* v. *Tudge*, 2 Wils. 20.

(*l*) *Wilton* v. *Hardingham*, Hob. Rep. 129.

(*m*) *Evelin* v. *Davies*, 3 Lev. 206. S. P. *Conyers* v. *Franks*, ibid. 19.

CHAP. VIII.

This doctrine has however been completely overruled in several later cases; and it now seems to be perfectly clear, that if the jury do in the first instance amerce in a sum certain, no affeerment is afterwards necessary. (*n*)

In such case, the regular course of proceeding therefore appears to be, for the court to declare the defendant to be *in misericordia*, and thereupon for the jury to find, that he be therefore amerced in the sum of forty shillings, or other certain sum. (*o*)

Where the offence committed by the defendant is such as to be properly cognizable by the court alone, it is still more clear that no affeerment is necessary; for then the judgment of the court is rather in the nature of a fine, than an amerciament. (*p*)

Amerciament for Joint Offences.

Where one offence is committed jointly by several persons, the amerciament may be joint; but then it must be severally affeered upon each, and several Distresses must be made for such affeerments. But where the commission of the offence is several, in each of the defendants: the amercia-

(*n*) *Brook* v. *Hustler*, Salk. 56. *Matthews* v. *Cary*, 1 Shower, 62. *Duke of Bedford* v. *Alcock*, 1 Wils. 251. *Stephens* v. *Houghton*, 1 Barnard. 214.

(*o*) The Cases last cited, and *Grieslev*'s Case, 8 Rep. 39, 40.

(*p*) Ibid. and S. C. 3 Salk. 23.

ment must necessarily be several in the first instance. (*q*)

In some cases however, as for a nuisance committed by the inhabitants of a town, or hundred, the amerciament must of course be general. (*r*)

Where a Distress for an Amerciament may be made.

A Distress for an amerciament may be made in the highway, as the statute of Marlebridge does not extend to this kind of Distress. (*s*) For an amerciament in the sheriff's tourn, the Distress may be taken in any part of the county: and if made in a hundred, may be taken in any part of the hundred, unless on land in the posssesion of the king. So that the lord may distrain the goods of the offender, if found on the lord's own demesne lands, within the jurisdiction of the court; (*t*) or indeed, on lands holden of any other person within such limits. And therefore, if a man belonging to one district of a leet be amerced in the court leet, his goods may be taken in any part of its jurisdiction, although in a different district. (*u*)

Whose Goods may be distrained.

Amerciaments being for a merely personal offence, the goods of the person amerced only can be taken; and not those of a stranger, although levant and couchant on the offender's land. (*x*)

(*q*) *Godfrey's* Case, 11 Rep. 42, 43.
(*r*) Ibid.
(*s*) 2 Inst. 131. 1 Roll. Abr. 670.
(*t*) Roll. ibid.
(*u*) 6 Edw. 3. 10. cited in *Godfrey's* Case, 11 Rep. 44. b.
(*x*) 2 Hawk. P. C. 59.

Where several amerciaments are due from one person for distinct offences, it seems that they should not be distrained for together in one entire sum; but should be levied separately. (*y*) This rule however was held not to apply to the case of a justification in trespass for making one Distress for several rates; for where upon an appeal against an assessment it was confirmed, and one warrant of Distress made for that and other taxes; and trespass was brought by the person whose goods were distrained; the court held, that however improper the tax objected to might be, it was binding on the parties, and the warrant, though it included all the taxes, was sufficient to support the Distress. (*z*)

Distress for Penalties and By-Laws.

Another subject of Distress analogous to fines and amerciaments, is that of Penalties. Some of which are imposed by By-Laws, and others by Acts of Parliament. The most common remedy for the recovery of penalties imposed by the authority of By-laws, is an action of debt: in some cases however they are also recoverable by Distress: but this is only where the By-law itself enacts that the penalty shall be levied by Distress, or there is a prescription for levying it in that manner. (*a*) No By-law can however go further, than to warrant the Distress; for if it enact, that

(*y*) Hunt's Gilbert, p. 65.

(*z*) *Patchett* v. *Bantroft*, 7 T. R. 367.

(*a*) 1 Roll. Abr. 366, 367. *Clarke* v. *Tuchet*, 3 Lev. 281.

the offender's goods shall not only be distrained, but also sold; it is utterly void both for the sale and the Distress. (*b*) CHAP. VIII.

As the infraction of a By-law is a merely personal offence, the Distress must always be understood to extend only to the goods of the offender. (*c*) And therefore if a township be liable to a penalty, it cannot be levied on the goods of an individual, unless he be entitled to have contribution from other persons subject to it. (*d*)

Where a By-law is binding, it is good without particular notice to those who are subject to it. And therefore a By-law in a manor binds the tenants without notice, because they are supposed to be within the manor. (*e*)

By-laws, like customs, depend on their legal requisites for validity. And therefore, no Distress under them can be supported, unless they are lawful, reasonable, and not injurious to the public.

Of a Distress to compel appearance.

There is indeed another proceeding, which bears considerable analogy to a Distress for fines and amerciaments; I mean that of distringas, to compel appearance in various courts, to actions real or

(*b*) *Clarke* v. *Tucket*, 2 Vent. 183.
(*c*) 1 Roll. Abr. 366.
(*d*) *Wells* v. *Cotterel*, 3 Lev. 49.
(*e*) *Isaac* v. *Ledgingham*, 1 Ventr. 167.

CHAP. VIII. personal. But as the consideration of the nature and rules of that process does not exactly fall within the design of the present work, I shall content myself with offering to the reader, what has been written on this subject by the Lord Chief Baron Gilbert.

"Here it may not be improper (says that learned writer) barely to mention another sort of Distress, which is the last and great process in courts of judicature, to bring the defendant into court, and oblige him to appear in civil cases, in actions as well real as personal."

"This process is the attachment, which lies as well in inferior courts, not of record, as in superior courts; and it is given, when the defendant has been summoned to appear, and makes default; and it was not a process against the body of the defendant, but against his goods and chattels; for the officer attaches the defendant by his horse, his ox, or his cow. And where this process issues out of a court of record, there is no doubt, but if the defendant makes default, the goods he was attached by, are forfeited; because, in such case, there is a judgment of the king's court of record, condemning the goods which alters the property."

"And it seems, that in the county court, and court baron, which are not courts of record, if the defendant does not appear upon the attachment or

Distress, the goods by which he was attached or distrained, are likewise forfeited on his default. The reason why in this single instance, the property is altered without the king's writ, or the judgment of a court of record, seems to be, for the more speedy administration of justice, which is of public advantage, and the party by his appearance, might have prevented the forfeiture." CHAP. VIII.

"And here, we may likewise observe, that where the plaintiff recovers in the county court or court baron, the execution is only by Distress, that is, there issues a precept to the officer of the court, to take the goods of the defendant, and keep them in pound, until the defendant satisfy the plaintiff his debt. The reason is, because those are not courts of record, being held only in the lord's or sheriff's name, and therefore all the process runs in their names, and not in the king's; and without the king's writ, no property can be altered. So that the execution in these inferior courts only seizes and detains the defendant's goods, until he make the plaintiff satisfaction for his debt. We find therefore in the register, the king's writ *de executione judicii* of these inferior judgments, and by virtue of that, they may levy the plaintiff's debt, as if he had recovered in a court of record. In the lord's court, if the defendant does not appear to do justice to the complainant on the summons, on the next process he ought to give pledges or caution for his appear-

CHAP. VIII.

ance; and therefore, upon the attachment, they may return him attached, *per plegios*, and then if he don't appear, his pledges shall be amerced; for which amerciament, the lord may have his action of debt; if the defendant cannot find pledges, the attachment is *per vadios;* and since the lord would have had the amerciament, if the defendant had been attached by pledges, and had not appeared: therefore, if he be attached *per vadios*, and do not appear, the *vadii* are forfeited: for the *vadii* came instead of the *plegii*, and therefore, are hypothecated for his appearance in judgment of law. And by consequence, if he doth not appear to perform the condition of such pignoration, the *vadii* are forfeited, and therefore the defendant, where he is attached *per vadios*, may before the day of his appearance, replevy the *vadios*, and put in pledges, who are answerable for his appearance; and if he makes default, are amerced."

"But if there be a *levari facias* for a debt recovered in the lord's court, there the goods are not forfeited on the return; because after judgment, he hath no day to appear: and therefore, there can be no forfeiture arising to the lord, nor the party; inasmuch as he was not bound by his fealty to do any such act to the party recovering; and consequently here, the lord only seizes the chattels of his tenant, to make him pay his debts. But the plaintiff must apply to the king's court, to have the property altered by a writ, *de execu-*

tione judicii, and so hath a complete remedy for his demand." CHAP. VIII.

"But if the *vadii* were not to be forfeited on mesne process, the tenant will let such goods lie till at his leisure he could come in to contest the debt, which would tend to the delay of justice."

"And here, note by the way, that the lord's Distress for rent, is in nature of a prerogative process, to take the goods and chattels of his debtor, in the first instance, without any summons; but at the next court-day such Distress is not forfeited to the lord, if not replevied, because then he would judge of forfeitures in his own cause."

"But if the tenant was aggrieved, he must apply to the king, who is the paramount, and the complaint is, that he was distrained *contra vadios et plegios*, that is, when he was ready to give good security to contest the lord's debt; and therefore, the judgment in replevin is of return irreplevisable; that is, that the lord has a just cause to detain —that such prerogative of the lord's should take place, till the debt be satisfied." *(f)*

(*f*) Gilb. on Distresses, &c. by Hunt, p. 19—32.

CHAPTER IX.

Of a Distress for Tolls and Port Duties.

Nature of Toll.

TOLL is of various kinds; the principal of which is a duty usually paid by the buyer of goods, upon the sale thereof in a fair or market. It is not however necessarily incident to every market or fair, for if the king grant to a subject by patent, a market or fair, without a grant of toll, the patentee will not be entitled to toll therein. (*g*) So that it can be claimed only by grant, or prescription. (*h*)

It is not however sufficient, that there be a grant of toll; for if such toll be not reasonable and moderate, the grant will be void. (*i*) And that it may appear to have this requisite to its validity, as well as to render it certain, it seems that

(*g*) 2 Inst. 220. *Holloway* v. *Smith*, Stra. 1171. 4 Mod. 319.

(*h*) *Warrington* v. *Mosely*,

(*i*) 2 Instit. 220.

the amount of the toll should be specified in the grant; or it will otherwise be void. Thus, where there was a grant to take such toll at two bridges within a manor, *as is used to be taken ibi et alibi infra regnum Angliæ*, was held uncertain and void. (*k*)

Of common right, no toll is due for things brought to a market or fair, unless they be sold; and then the toll is to be taken of the buyer: but in ancient fairs or markets, toll may be due for standing, although nothing be sold. This however can be supported only by custom; and the fair or market must have been granted before the period of legal memory, that is, before the reign of King Richard the First. (*l*) The toll must also be confined to a common fair or market, which implies a public benefit, and therefore cannot be claimed for all goods sold within the limits of a manor. (*m*) And even for things sold in a market, toll is not due of common right, except upon the sale of live cattle; (*n*) although by special custom or prescription, it may be due upon all things sold therein. (*o*)

Where toll is due on things sold in a market, it

(*k*) *Lightfoot* v. *Lenet*, Cro. Jac. 421. See note (*a*) *Holcroft* v. *Heel*, 1 Bos. and Pull. 402.

(*l*) 2 Instit. 221. *Leight* v. *Pym*, 2 Lutw. 1336.

(*m*) *Warrington* v. *Mosely*, ut supra.

(*n*) *Heddy* v. *Walhouse*, Moore, 474.

(*o*) *Lord Cobham* v. *Brown*, 1 Leon. 218.

seems that it may be due on such sale, although the goods sold be not brought into the market, but only sold there by sample. (*p*) If however the toll be due in specie, it can of course be claimed only in respect of goods brought into the market, and sold there; for otherwise the toll could not be specifically taken. (*q*)

Toll-Traverse.

Toll-traverse is a toll due for a passage over a man's private soil. It is not however due of common right, but must be prescribed for; although no consideration is required to support such prescription; because it is but a reasonable compensation for the use of another's land. (*r*) And if there be such a prescription for toll due to the lord, for passing over any part of his manor, it will be good, although the land itself be not in his possession; for it may be presumed to have been anciently part of the demesnes of the manor. (*s*) Where such toll is due, it is said, that it should be claimed as an easement, and not as appendant to the manor. (*t*)

Toll-Thorough.

Toll-thorough is a toll claimed for a way through a common street or public highway. And as such a claim is against common right, it is requisite

(*p*) *Mosely* v. *Pierson*, 4 T. R. 108. *Bailiff and Burgesses of Tewkesbury* v. *Diston*, 6 East, 438.

(*q*) 6 East, ibid.

(*r*) *Smith* v. *Shepherd*, Cro. Eliz. 710. 2 Roll. Abr. 522.

(*s*) *Crispe* v *Belwood*, 3 Lev. 424. *Prideaux* v. *Warne*, 2 do. 96.

(*t*) *Anonymous*, 54. Keilw. 152.

that there should be not only a grant or prescription to support it, but also that a consideration for such grant or prescription should be shewn; as that of repairing the street or public way. (*u*) And such consideration must belong to the place itself in respect of which the toll is claimed, and therefore a prescription for toll of all goods carried through a town, in consideration of repairing only some of its streets, cannot be supported. (*x*) But where toll was claimed for passing over a highway which had been immemorially public; yet upon its being shewn, that anciently before the time of legal memory, the soil and the toll were united in the same proprietor, after which time the way had become public, the court held, that the dedication of the way to the public, should be presumed to have been made in consideration of the toll; and therefore that no other consideration was requisite to support the prescription. (*y*) But unless there be some particular presumption to support the claim, a mere prescription is insufficient. And therefore a claim of toll for passing along a public navigable river, running through the plaintiff's manor, is bad; for it is a prescription against the common right of all the subjects of the realm. (*z*)

(*u*) 2 Roll. Ab. 522. *Smith* v. *Shepherd*, Moore, 574. *Mayor, &c. of Nottingham* v. *Lambert*, Willes, Rep. 115.

(*x*) *Truman* v. *Walgan*, 2 Wils. 296.

(*y*) *Lord Pelham* v. *Pickersgill*, 1 T. R. 660.

(*z*) *Mayor of Nottingham* v. *Lambert*, Willes, Rep. 111.

CHAP. IX.

Distress for Port-Duties.

Another species of toll is that of port-toll, or port-duty; which is a claim of toll for vessels coming to, or going from a port or wharf; or for goods landed there, or exported therefrom. In some of these cases, a specific consideration for the toll must be shewn; in others a sufficient consideration is implied by the mere existence of the port, in respect of which the toll is claimed. Thus, where the lord of a manor, in consideration of keeping and repairing a wharf within his manor, prescribed for toll on all goods landed within the manor, though not at the wharf, such prescription was held to be good as an easement of the manor, all the lands of which must be presumed to have been originally in the hands of the lord; and therefore such toll was to be considered as a toll-traverse, and not a toll-thorough. (*a*) But where the lord, in consideration of repairing a quay, claimed toll on all lands brought into the river, although landed at a distance from the quay, and without the manor; such prescription was clearly held to be bad. (*b*) So where the city of Norwich, in consideration of repairing a quay, claimed toll for all vessels passing by it, it was determined to be void: for this is a mere toll-thorough, claimed for using a public river, without any consideration extending to the river itself. (*c*)

(*a*) *Crispe* v. *Belwood*, 3 Lev. 424. *Colton* v. *Smith*, Cowp. Rep. 47.

(*b*) *Prideaux* v. *Warne*, 2 Lev. 96.

(*c*) *Anonymous*, 1 Vent. 71. *Heshord* v. *Wills*, 1 Sid. 454.

But toll or port duty, strictly so called, claimed in respect of a public port, does not require any other consideration to support it than the existence of the port itself, which alone implies a public benefit. (*d*) So that, in a modern case in which the corporation of Yarmouth claimed measurage, or a toll of two pence for every last of corn or grain measured and exported from the port of Great Yarmouth, the court of King's Bench held that it was not necessary to allege or shew any repair done to the port; for that the mere existence of the port was sufficient to support the plaintiff's claim. (*e*) So, where the mayor and commonalty of London claimed weighage for all goods brought into the port of London, it was held to be good, for the bringing them into port, which is a place of safety, implies a consideration in itself. (*f*) Indeed, as the owners of a public port are of common right bound to keep it in repair, for the neglect of which they are liable to indictment, such implied obligation is a sufficient consideration for the toll.

It may therefore be taken as a general rule, that tolls and duties are of common right incident to every public port. And they are due in different kinds, according to the nature of the property in the port, as a franchise only, or in the very soil

(*d*) *Wilkes* v. *Kirly*, 2 Lutw. 1523.

(*e*) *Mayor of Yarmouth* v. *Eaton*, 3 Burr. 1402.

(*f*) *Mayor of London* v. *Hunt*, 3 Lev. 37.

CHAP. IX. itself. Some kinds of toll, as anchorage and ballastage, being incident to almost every port; other kinds, as keelage, primage, &c. being generally due by special usage and prescription. (*g*)

Although tolls are thus in many cases due by prescription, and in others of common right, there are some persons who may claim to be exempt from them. Thus the king, by his prerogative is free from all tolls. (*h*) And by the custom of the realm, both the lord and tenants in ancient demesne may claim to be quit of all kinds of toll in markets or fairs, for goods bought or sold by them for the sustenance of their families, or tillage of their lands; (*i*) but not for goods bought in the way of merchandize. (*k*) They are also free from pontage, murage, and passage; and this privilege extends to them, whether the lands be in the seisin of the king or a subject. By the like custom, ecclesiastical persons are said to be free from toll on all goods bought for their own maintenance. (*l*) So the inhabitants of a city or borough may in some cases prescribe to be quit of toll: (*m*) as to pass free of toll over an ancient ferry. (*n*) And in a modern case, the court of

(*g*) *Hale de portibus Maris apud.* Harg. Law Tracts.
(*h*) *Rex* v. *Corporation of Maidenhead,* Palm. 85.
(*i*) F. N. B. 228.
(*k*) *Ward* v. *Knight,* 1 Leon. 231. S. C. Cro. Eliz. 227.
(*l*) F. N. B. 227.
(*m*) Id. 226. *Osbuston* v. *James,* 2 Lutw. 1380.
(*n*) *Payn* v. *Partridge,* 1 Salk. 12.

Common Pleas recognized the right claimed by the freemen of London, to be exempt from the payment of all tolls and port duties throughout England, except the prisage of wines. (*o*) So the king may grant by charter to the commonalty of a city or burgesses of a borough, to be quit of tolls throughout England; (*p*) but it seems that such a grant does not exempt from toll claimed by custom, or by virtue of a preceding grant of toll made by the crown. (*q*) CHAP. IX.

Distress is said to be incident to every toll; (*r*) but this I apprehend must be understood only of such toll as is not against common right; such as market toll, toll traverse, and port duty: but that for toll thorough, the plaintiff must not only prescribe for the toll, but also for the Distress.

A Distress for toll is exempt from some restrictions which belong to other Distresses. It is not within the statute of Marlebridge, and therefore may be taken on the highway: (*s*) indeed if this were not allowed, the remedy of Distress would frequently be defeated; for in some cases

(*o*) *Mayor, &c. of London* v. *Mayor, &c. of Lynn Regis*, 1 H. Bl. 206.

(*p*) *Leight* v. *Pym*, 2 Lutw. 1332.

(*q*) Hale, note (*c*) to F. N. B. 226.

(*r*) *Hickman's* Case, Noy. 37.

(*s*) 2 Inst. 131. *Smith* v. *Shepherd*, Cro. Eliz. 710.

CHAP. IX. the toll iself, as toll thorough, arises from the very circumstance of being in the highway.

A similar remark may be applied to the exemption from Distress, which belongs to goods in fair or market, or such as are the implements of trade, which exemption therefore does not extend to a Distressfor toll. (*t*) But it should seem, that the toll itself must arise within such fair or market; and therefore that goods found therein cannot be distrained for toll arising elsewhere.

The Distress may be made either on the thing itself for which the toll is due, as a horse, for his toll thorough; (*u*) or on a part of such thing, as on a cable or anchor, for the toll of a ship; (*x*) or on a sheep, for the toll of the whole flock. (*y*) And if the Distress cannot be made on the subject of the toll, it may be made on any other goods of the person from whom it is due, that may be found where the toll is due. (*z*) Nor is it confined to the goods of such persons as may be strictly the owners of the things for which the toll is payable; for where port toll was due on goods exported, the owner of the ship in which they were ex-

(*t*) *Osbuston* v. *James*, 2 Lutw. 1380. *Vinkenstone* v. *Ebden*, Carth. 358. S. C. 1 Salk. 248.

(*u*) *Harrison* v. *Brough*, 6 T. R. 706.

(*x*) *Prideaux* v. *Warne*, 2 Lev. 96.

(*y*) *Smith* v. *Shepherd*, Cro. Eliz. 710. *Osbuston* v. *James*, 2 Lutw. 1380.

(*z*) *Vinkenstone* v. *Emden*, Ld. Raym. 386. S. C. 1 Salk. 248.

ported, although he had no property in the goods, was considered with relation to the proprietors of the toll, to be the exporter of the goods, and as such, that the sails of his ship might be distrained for the duty. (*a*)

(*a*) Ibid.

CHAPTER X.

Of a Distress of Things Damage-Feasant.

If cattle, or other things, be on a man's land, incumbering it, or otherwise doing damage there, they may be distrained by the person injured thereby: which is called a Distress of things damage feasant. And "this (says Lord Gilbert) "according to Fleta, is grounded on a particular "custom of the realm. *Dicere poterit captor,* "*quod justè cepit averia, quia invenit illa in terrâ* "*suâ, et secundum consuetudines regni impercavit* "*illa, donec damnum suum fuerit emendatum.*(b) "But from whence this notion was borrowed, or "whenever it was introduced, it is highly reason- "able, that the owner of the land should defend "himself from injury, by driving out the beasts, "and likewise by detaining the thing that did the "injury, in a public pound, till compensation be

(b) Fleta, p. 101. § 84.

"made for the trespass; for otherwise he might "never find the person whose beasts committed "the trespass." (*c*)

As a Distress of things damage-feasant is made for the immediate injury sustained by their so doing damage, it is reasonable that this remedy should not be confined to the mere owner of the soil, on which they may be found: and it therefore extends to those who may be injured by their being thereon; as commoners, or other persons entitled to the use or produce of the land. (*d*) For as the soil itself usually belongs to the lord, if the remedy of Distress were confined to him, the commoner might often be left without sufficient redress. (*e*) But he cannot resort to a Distress, where the owner of the cattle has any colour of right to put them on the land: for to distrain them in such a case, would be for the commoner to judge for himself in a question that depends upon a more competent inquiry; but where cattle are put upon the common, without any colour or pretence of right, the commoner may distrain them; and therefore he may always distrain the cattle of a stranger thereon. (*f*)

But it seldom happens, that a commoner can distrain the cattle of the lord, unless by special

(*c*) Gilb. Distr. by Hunt, p. 26.
(*d*) 1 Roll. Abr. 405.
(*e*) *Mary's* Case, 9 Rep. 112. b.
(*f*) *Hall* v. *Harding*, 4 Burr. 2432.

CHAP. X.

custom. (*g*) In some cases however he may, as where the land was by custom to lie fresh until lady-day in the year succeeding the cutting of the corn, during that time the lord being absolutely excluded from the land, it was held that the commoner might distrain his beasts found thereon. (*h*) So, where by custom the lord could not put on the land more than three horses after lammas-day, it was determined that the commoner might distrain any additional horses, for they were as evidently trespassers on the land, as if they had belonged to a stranger. (*i*) And it seems, that if cattle be agisted by the lord, and improperly put on the common, the commoners may distrain them as the cattle of a stranger. (*k*) Indeed there seems to be good reason, why in many cases, commoners should be permitted to distrain the cattle of the lord, since it is held that even the copyholders of a manor may be entitled to the sole and several pasture of the lord's soil, to the exclusion of the lord himself. (*l*) But where the lord has any pretence of right for putting on his own cattle, although he may have been guilty of a surcharge, provided his number be not *absolutely stinted*, it is perfectly clear that the commoner cannot distrain

(*g*) *Kinrick* v. *Pargiter*, Yelv. 129.

(*h*) 1 Roll. Ab. 405—6. *Burt* v. *Moore*, 5. T. R. 335.

(*i*) *Kinrick* v. *Pargiter*, Cro. Jac. 208. S. C. Yelv. 129. This custom or prescription against the lord is indeed denied to be good in 2 Roll. Ab. 267; but as it should seem for a very insufficient reason. V. Burr. 2429. ut supra, and Saund. cited infra.

(*k*) 30 Edw. 3. 27.

(*l*) *Hoskins* v. *Robins*, 2 Saund. 324.

those surcharging. (*m*) And indeed the same rule of law applies to the case of a surcharge made by another commoner. So that if the owner of the cattle have a right of common of pasture for two sheep for every acre of land, here the number of the cattle not being absolutely certain in itself, but requiring a medium to determine it, namely an admeasurement of the commoner's land; another commoner cannot distrain the cattle surcharging. (*n*) So if the right of common be for cattle levant and couchant on the owner's land, another commoner cannot distrain for a surcharge, but must try by a jury, the number accommodated to the land. (*o*) If however a commoner's right be absolutely stinted in number, as to put on ten beasts only, and he puts on a greater number, it should rather seem, that the overplus may be distrained by another commoner, and certainly may be distrained by the lord. (*p*) If the stint of common be for one beast, and two be separately put on, it seems that only the beasts last put on can be distrained for the surcharge; but if they are put on together, then the lord may distrain which of them he chuses. (*q*)

Where a commoner agrees not to exercise his right of common for a certain time, he thereby

(*m*) *Hodesdon* v. *Gresil*, Yelv. 104. Danv. Abr. Vol. 1. pl. 6. in margine.

(*n*) Burr, 2431. ut supra.

(*o*) S. C. Bl. Rep. 674.

(*p*) 1 Roll Abr. 665. *Dixon* v. *James*, 2 Lutw. 1241. Burr, 2431. ut supra.

(*q*) *Ellis* v. *Rowles*, Willes, 638.

CHAP. X. during such time, renders himself a stranger to the land, and his cattle may be distrained accordingly. Thus, where A. was possessed of part of a common field, with right of common over the whole field, and B. having a similar right, they entered into an agreement not to exercise their rights for a certain number of years, it was held that A. might distrain, as damage-feasant, the cattle of B. coming on his land during that time. (*r*) But such a Distress can be made only for the cattle doing damage on the distrainor's part of the land; for if there be a shack common, (that is, an open common field consisting of different parcels with intercommonings) of which every one knows his own parcel, and cattle be put on it at an improper season of the year, they can be distrained only by him on whose parcel of the common field they are damage-feasant. (*s*)

If a Distress damage-feasant be made in respect of a right of common of pasture, to which two tenants in common are entitled, the Distress should be joint; for it is made in respect of their joint possession, and not of their several estates. (*t*) And as a Distress for damage-feasant is made on account of an immediate injury or prejudice to the enjoyment of the land and its produce, the right of Distress will pass to a grantee of the vesture of the soil. So that, where A. demised to

(*r*) *Whiteman* v. *King*, 2 H. Bl. 4.

(*s*) 1 Roll. Abr. 665.

(*t*) *Culley* v. *Spearman*, 2 H. Bl. 386.

B. the milk of twenty-two cows, to be provided by A. and fed at his expence on certain closes belonging to him, and he covenanted that B. might turn out a horse, and that no other cattle should be fed there, it was held that B. might distrain, as damage-feasant, any other cattle of A. found thereon. (*u*) In like manner, if a man put cattle into my pasture for a week, and afterwards I give him notice that I will keep them no longer, and he will not fetch them away, I may then distrain them as damage-feasant. (*x*) CHAP. X.

Cattle may be distrained as damage-feasant, not not only for the injury which they may do to the pasture or herbage of the land, but for damage of any other kind; as by the lord of the soil, although he may not have any interest in the herbage; for there may be other damage besides eating the grass, as by destroying plants or trees, in which the interest of the lord still continues. (*y*)

As this kind of Distress is made for the injury sustained by reason of the very thing distrained, it necessarily follows, that no kind of thing which is capable of being damage-feasant can be exempted from Distress; (*z*) unless it be in immediate use, as a horse on which a man is riding, or a net in his hand; (*a*) for to distrain these might probably

(*u*) 5 T. R. 329. ut supra.
(*x*) *Noy*'s Max. 33.
(*y*) *Hoskins* v. *Robins*, 2 Saund. 328.
(*z*) Com. Dig. Distress, B. 4.
(*a*) See the cases cited post. chap. 11.

CHAP. X. lead to a breach of the peace. But the Distress must be confined to the very thing which is damage-feasant; for one thing cannot be distrained for the damage done by another. Thus, as we have seen in the case of surcharging common, (*b*) it is only the cattle creating the surcharge, that can be distrained. So if ten head of cattle be damage-feasant, the owner of the soil cannot distrain one of them, for the damage done by all; but only for the damage done by itself; and he must bring trespass for the damage done by the remainder. (*c*) The same cattle may however be twice distrained, if they a second time do damage on the land, although their owner may have replevied them after the first Distress, for this is a new injury. (*d*)

If cattle be really trespassers on the land, it matters not to whom they belong, for they may be distrained damage-feasant although they may have come on the land without their owner's knowledge or consent, or by the default of another, (*e*) provided, that it be not by the default of the owner of the soil, or his tenant; as by not properly repairing the fences of the land; for in that case, the distrainor cannot take advantage of his own wrong. But if the owner of the cattle suffer them to remain on the land after notice given to him to remove them, they may be

(*b*) Ante, p. 199.
(*c*) *Vaspor* v. *Edwards*, 12 Mod. 660.
(*d*) F. N. B. 71.
(*e*) 1 Roll. Abr. 665.

distrained for any damage done after such notice. (*f*) CHAP. X.

As a Distress of things damage-feasant must be made whilst they are doing damage, the law allows this Distress to be made in the night, or in short, whenever they are so found on the land; for otherwise, the cattle might escape. (*g*) But in all other respects, both as to time and place, this kind of Distress is of all the strictest; for the thing distrained must be taken in the very act; so that if the cattle are once off the land, they cannot be taken even on fresh pursuit, (*h*) although they may have been purposely driven off the land, in order to prevent the Distress, and within the very view of the person coming to distrain them. (*i*) If however the distrainor once *enter the locus in quo* to distrain the cattle, it should seem that they cannot afterwards be driven off the land, (*k*) so as to prevent the Distress.

Cattle can be distrained only for the damage done *at one time* on the land; so that, if beasts trespass on the land on one day, and then go off, before they can be distrained, and trespass on it the next day, and then are taken, they cannot

(*f*) *Edwards* v. *Halinder*, 2 Leon. 93. *Kimp* v. *Crewes*, 2 Lutw. 1579. Com. Dig. Pleader, 3 M. 29. cited in note (4) to *Poole* v. *Longueville*, Wms. Saund. 2. 285.

(*g*) Co. Litt. 142. a.

(*h*) *Vaspor* v. *Edwards*, 12 Mod. 660.

(*i*) Co. Litt. 161. a.

(*k*) *Clement* v. *Milner*, 3 Esp. Rep. 95.

detained for the damage done on both days, but only for that done on the latter. (*l*) And, as I have before observed, if there are several beasts, each must be detained only for the damage done by itself, and not for any part of that done by the rest. (*m*)

If cattle be merely on the land, but not doing damage there, (which may very well happen if there be not at the time any thing growing thereon) it seems that they cannot be distrained as damage-feasant. (*n*)

Things can be considered as damage-feasant only on a private soil: so that corn pitched in a market, or hides brought there for sale, cannot be distrained as damage-feasant; for things cannot be said to be damage-feasant in a public market, where persons have a right to bring their goods for sale. (*o*) But where any thing is improperly placed on another's soil, it is not necessary that it should actually do an injury to the soil, or its produce; it is enough that it unlawfully incumbers it; and therefore if turves be laid on a common, it seems that they may be distrained by a commoner as damage-feasant, although he could not justify destroying them. (*p*) For a distrainor can have no right to

(*l*) 12 Mod. 660. ut supra.
(*m*) Ibid.
(*n*) Ibid. and Fleta, p. 101, § 26.
(*o*) *Mayor of Lawnson's* Case, Cro. Eliz. 75. *Frasel* v. *Morris*, Noy, Rep. 19. *Austin* v. *Whitred*, Willes, Rep. 623.
(*p*) *Bromhall* v. *Norton*, Sir Thomas Jones, 193.

use destroy or injure the things taken as damage-feasant, but only to detain them, as a pledge for the satisfaction of the injury sustained. And therefore, if a person endeavouring to distrain beasts damage-feasant, improperly drive and chase them, so as to injure the cattle, their owner will be entitled to recover a satisfaction in damages. (*q*) CHAP. X.

(*q*) *Anonymous*, 3 Leon. Rep. 15.

If two persons are possessed of adjoining Closes, neither being under any obligation to fence, each must take care that his Cattle do not enter the Close of the other.

But quere if two persons have the concurrent possession of land for the purpose that each may take profits of a special nature, and distinct from, but inconsistent with, the right of the other, whether either one is bound to guard against casual damage, which during, and by the bare enjoyment of his right, may happen to the other?

But clearly the one cannot distrain the Cattle of the other damage feasant.

Churchill v Evans 1 Taunt 529.

CHAPTER XI.

Of the Things which may be taken as a Distress.

It may be laid down as a general rule, that even at the common law, all personal chattels are liable to be taken as a Distress, unless they fall within some of those exemptions which will be hereafter specified. And as with relation to such exemptions, the points of difference between the subjects of a Distress for rent, or other causes, are not very numerous, it will be convenient to consider them together, pointing out their distinctions as we proceed.

It has been already observed, that a Distress was regarded at the common law only as a pledge. And this principle has given birth to various exemptions from the general liability to Distress, both with respect to the nature of the thing distrained, and the property, or possession of the person from whom it is taken.

No Distress of things in which there can be no valuable property.

First, As every thing which is distrained is presumed to be the property of the wrong doer, the Distress must be of a thing in which there may be a valuable property: and therefore dogs, cats, bucks, does, or other animals that are *ferœ naturæ*, cannot be distrained. (*r*) Yet if deer are kept in a private inclosure for sale, or profit, they may be distrained for rent. (*s*) And other animals, as greyhounds and ferrets, and indeed all personal chattels, may be taken damage-feasant. (*t*)

Nor of things in present use.

Secondly, Whatever is in a man's present use or occupation, is during that time privileged from Distress; as a horse on which he is riding, or an axe with which he is cutting wood. (*u*) This rule extends even to the case of a Distress damage-feasant; for although it is said to have been formerly held, that horses might be severed from the plough, (*x*) or a horse taken damage-feasant, and impounded, although a rider were upon him; such Distress is now determined to be unlawful, as it would be liable to lead to a breach of the peace. (*y*) So nets or ferrets cannot be taken damage-feasant in a warren, if they are in the hands of a person using them. (*z*) And although it was

(*r*) Co. Litt. 47. a. Blackst. Comm. V 3. 7.

(*s*) Bl. Comm. 3 V. 8. *Davies* v. *Powell*, Willes, 46.

(*t*) *Athill* v. *Corbet*, Cro. Jac. 463. Vin. Abr. Distress, A. Com. Dig. Distress, B. 4.

(*u*) Co. Litt. 47. a.

(*x*) *Tunbridge's* Case, Cro. Eliz. 7.

(*y*) Hargrave, note (12) on Co. Litt 47. a. *Storey* v. *Robinson*, 6 T. R. 139.

(*z*) Harg. Note (13) ibid. *Read* v. *Burley*, Cro. Eliz. 550.

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formerly considered, that a cart and horses when carrying corn, or hay, might be distrained for rent-service, (*a*) it seems now to be held, that such a Distress would be illegal, as being made on things in immediate use. On the same ground, it has been determined, that a loom cannot be distrained when in the hands of the weaver; (*b*) nor wearing apparel, if in actual use; but if put off, though only for the purpose of repose, it is liable to be taken as a Distress for rent. (*c*)

Nor of things in the way of trade.

Thirdly, "Valuable things in the way of trade are not liable to Distress. As a horse standing in a smith's shop to be shoed, or in a common inn; or cloth at a tailor's house, or corn sent to a mill or market. For all these are protected and privileged for the benefit of trade." (*d*) But these general rules must be understood with some limitations. For although the goods of a guest at a public inn are privileged from Distress, because such a place is *publici juris*, and all men have a right to use it without molestation: (*e*) yet this exemption was held not to extend to the case of a chariot, standing in the coach-house of a livery stable keeper; for that is not a common inn, and the hire of its standing may be considered as part

(*a*) *Welch* v. *Bell*, 2 Keb. 529, 596. S. C. 1 Sid. 422, 440.

(*b*) *Simpson* v. *Hartopp*, Willes, Rep. 517.

(*c*) *Bissett* v. *Caldwell*, 1 Esp. 206. S. C. *Peake*'s Cases 36. Hunt's Gilbert, 49.

(*d*) Bl. Comm. V. 8.

(*e*) *Robinson* v. *Walter*, 3 Bulstr. 269.

of the profits of the premises. (*f*) The goods to be exempted from Distress, must also be within the very precincts of the inn, and not on other premises at a distance belonging to it. (*g*) And even within the inn itself, the exemption does not extend to the goods of a person dwelling therein as a tenant, rather than a guest. (*h*)

For the general benefit of trade, it has been determined, that goods carried to be weighed, even at a private beam, if in the way of trade; or a horse that has carried corn to a mill to be ground, and during the grinding of the corn is tied to the mill door; are privileged from a Distress for rent. (*i*) So goods in a public fair cannot be distrained unless it be for toll due from their owner; (*k*) nor a horse which carries corn to a market, and is placed for a time in a private yard; (*l*) but if cattle be put to stand or depasture in a place in their way to the market, but remote from it, they may be distrained by the landlord for his rent; although he had notice of their being there, and consented to it; for such parol licence is no waiver of the right of Distress, without an express agreement to

(*f*) *Francis* v. *Wyatt*, 3 Burr. 1498. S. C. Bl. Rep. 483.

(*g*) *Croser* v. *Thomlinson*, Barnes, 472.

(*h*) *Francis* v. *Wyatt*, Bl. Rep. 484. Hunt's Gilb. 40.

(*i*) *Read* v. *Burley*, Cro. Eliz. 549, 596.

(*k*) *Oskuston* v. *James*, 2 Lutw. 1380.

(*l*) *Read* v. *Burley*, Cro. Eliz. 596.

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that effect. (m) But if such consent be deceitfully given for the purpose of obtaining a Distress, equity will relieve upon the ground of fraud. (n) Upon the same principle of the benefit of trade, goods are privileged from Distress, whilst in the hands of a common carrier; and even a private person undertaking to carry them for hire, is *pro hac vice* considered as a carrier; and the goods are protected whilst they remain in his possession. (o)

Of a Distress on the Goods of a Stranger.

In general, all goods found upon the premises demised, are distrainable for rent; whether they belong to the tenant or not; subject however to those rules of exemption relative to the nature of the things distrained, which belong to Distresses in general. But with regard to a stranger's beasts which are found on the tenant's land, the following distinctions are taken. If they are put into the land by consent of their owner, or come in by breaking its fences, being in repair, or even its defective fences, where neither the tenant nor his landlord is bound to repair them, they are immediately distrainable for rent arrere: but if they come in through defective fences, which the tenant or his landlord is bound to repair, the lord cannot

(m) *Fowkes* v. *Joice*, 2 Vent. 50. S. C. 3 Lev. 260. S. C. 2 Lutw. 1161.

(n) S. C. Prec. Ch. 7. 2 Vern. 131. The learned editor of Saunders is of opinion that cattle belonging to a drover being put into the ground with the consent of the occupier, to graze only one night in their way to a fair or market, would not now be held liable to be distrained for rent. Wms. Saun. 2 vol. 289. a. note (7).

(o) *Gisbourn* v. *Hirst*, 1 Salk. 249.

distrain them for service, until they have been levant and couchant on the land; nor can the lessor distrain them for rent, (although they may have been levant and couchant, and even have remained on the land for several days) until after notice given to their owner to remove them. This rule however is said not to apply to the grantee of a rent-charge, nor to the lord of the fee distraining for an ancient rent; who may in such case distrain the cattle after they have been levant and couchant: (*p*) but if before that time, the owner pursue and retake them, they will be saved from the Distress. (*q*) And where such cattle was distrained for a rent-charge twenty years in arrear, equity relieved against it. (*r*) CHAP. XI.

Implements of Trade and Husbandry, &c.

Fourthly, The tools and utensils of a man's trade, the implements of husbandry, beasts of the plough and sheep are also privileged from Distress, not only while in actual use, but whilst any other sufficient Distress can be found on the premises. (*s*) This

(*p*) 1 Roll. Abr. 668, 669, *Gill* v. *Gawin*. 2 Roll. Rep. 124. *Kimp* v. *Cruwes*, 2 Lutw. 1577. S. C. Ld. Raym. 168. *Anonymous*, 2 Leon. 7. Bl. Comm. 3. p. 8, 9. Harg. note (3) Co. Litt. 47. b. Wms. Saund. 289, note (7).

(*q*) *Fowkes* v. *Joice*, 2 Vern. 131.

(*r*) Bro. Distr. pl. 21.

(*s*) Co. Litt. 47. (*a*) Stat. de district. Scac. 51 Hy. 3. st. 4. *Gorton* v. *Faulkner*, 4 T. R. 565. The rule of exempting beasts of the plough from Distress, whilst any other Distress could be found, seems not to have owed its birth to the statute of 51 Hy. 3. but to have been as ancient as the common law itself. And this rule ap-

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rule however applies only to Distresses for rent in arrear, amerciaments, &c. i. but not to Distresses under particular statutes; which are rather in the nature of executions: and such things may therefore rule be distrained for poor's rates. (*t*) Nor does this extend to a Distress for damage-feasant; (*u*) or a Distress made for a toll or duty, arising in respect of the thing distrained, and other things connected with it. As for distraining two sheep out of a flock, by the owner of a market, for the toll due in respect of the whole flock. (*x*) Or taking the anchor, sails and cables of a ship, as a Distress for the port duty due for the vessel. (*y*)

No Distress of Perishable Goods.

Fifthly, As a Distress was anciently regarded only as a pledge, to be restored upon the performance of the duty for the default of which it was taken; it became a rule, that those things only should be distrained which could be removed and restored in as good plight as that in which they were taken. (*z*) And therefore at the common

pears, from Britton and the Mirror, as cited by Lord Coke, 2 Instit. 132, 133, to have been afterwards extended to armour, domestic utensils, apparel and jewels. Saddle horses also were exempted, probably on the distinction adopted by Bracton, lib. 4. fol. 217. between the *animalia laboriosa et otiosa*, and this privilege seems to have been still recognized in the time of Rolle. See Abridg. p. 667. pl. 24. p. 668. pl. 16.

(*t*) *Edgecomb* v. *Sparks*, 2 Show. 126. *Anonym.* 3 Salk. 136. *Hutchins* v. *Chambers*, 1 Burr. 579.

(*u*) Com. Dig. Distress, B. 4.

(*x*) *Osbuston* v. *James*, 2 Lutw. 1380. *Smith* v. *Shepherd*, Cro. Eliz. 710.

(*y*) *Vinkeustone* v. *Elden*, Ld. Raym. 384. S. C. 1 Salk. 249.

(*z*) Gilb. Distr. p. 34.

law, fruit, milk and other things of a perishable nature, could not be distrained: (*a*) nor money, unless in a bag, because the identical pieces could not be known. (*b*) Neither could grain or flour be taken out of a sack, or hay from a barn; because the quantity taken could not be ascertained: (*c*) nor corn in the sheaf, because the grain must be shed and scattered by removal, unless indeed it were found in a cart, in which it could be removed without injury or loss. (*d*) But this, as we have before seen, is now altered by stat. 2 W. & M. c. 5. s. 3. which enables any person to distrain for rent, sheaves or cocks of corn, or corn loose or in the straw, or hay in any barn or granary, or upon any hovel, stack or rick, or otherwise upon any part of the land charged with such rent. This provision is held to extend to corn in whatever state it may be, whether threshed or unthreshed: (*e*) and as this statute directs the Distress to be sold within five days unless replevied, perhaps the rule of the ancient common law with respect to the perishable nature of the Distress, no longer extends, in the case of a Distress for rent, to any thing which is not liable to deterioration within the period prescribed by the statute for the sale of the goods distrained.

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(*a*) Bl. Comm. 3. V. 9.
(*b*) 1 Roll. Abr. 667.
(*c*) Ibid.
(*d*) Ibid.
(*e*) *Bellasis* v. *Burbridge*, 1 Lutw. 214.

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Nor of things annexed to the Freehold.

Sixthly, Things which are affixed or annexed to the freehold, as furnaces, cauldrons, windows, doors and the like cannot be distrained; because they are not personal chattels, but belong to the realty. (*f*) And this rule extends to such things as are essentially parts of the freehold, although for a time removed thereupon; as a millstone removed to be picked: for this a matter of necessity, and it still remains, in contemplation of law, a part of the freehold. (*g*) And therefore the anvil of a smith fixed in his shop cannot be distrained; (*h*) nor a lime kiln, which is considered not to be a personal chattel, but belonging to the freehold. (*i*) Upon the same principle, growing corn could not be distrained at the common law; (*k*) but this rule, as I have before stated, is now altered by stat. 11 Geo. 2. c. 19. s. 8. by which, landlords or lessors to whom rent is in arrear, are enabled to take and seize all sorts of corn and grass, hops, fruits, roots, pulse, or other product whatsoever, which shall be growing on any part of the premises demised, as a Distress for such rent.

Or in the Custody of the law.

Lastly, Those things cannot be distrained which are already in the custody of the law; because the distrainor cannot legally take them into his own possession. And therefore goods taken damage-

(*f*) Co. Litt. 47. b.
(*g*) Bro. Abr. Distress, pl. 23. *Gorton* v. *Fawlkner*, 4 T. R. 567.
(*h*) Ibid.
(*i*) *Niblet* v. *Smith*, 4 T. R. 504.
(*k*) 1 Roll. Abr. 666.

feisant, or under an execution, or an extent, can not be distrained. (*l*) This rule has however been in some degree altered in favour of landlords, by the stat. 8 Anne, ch. 14. s. 1. by which, as we have before seen, it is provided, that no goods taken in execution upon any premises demised, can be removed, until the landlord shall have been paid his whole rent, if less than a year's rent be due; and if more, then the amount of one year's rent. Under the authority of which statute, it seems to be the duty of the sheriff, after notice given to him for that purpose, to pay to the landlord such rent, out of the sale of the goods taken in execution. (*m*)

(*l*) Gilb. Distr. p. 44. Et vide ante, ch. 4. p. 115. and see ante, ch. 4. p. 115. and post, chap. 12.
(*m*) Vin. Abr. Distr. O. 3.

CHAPTER XII.

Of the Manner in which a Distress should be made, and afterwards disposed of.

THE proceedings on a Distress are regulated partly by the rules of the ancient common law, and partly by statute. But the remedy of Distress for rent has been so materially altered and extended by the provisions of some modern statutes, and thereby rendered so different in its proceedings from all other Distresses, that it will be proper to consider them separately: and for this purpose, to inquire, first, into the manner of proceeding on a Distress for rent; and secondly, of proceeding on a Distress for other causes.

Of proceeding on a Distress for Rent.

Distress made by the Landlord.

A Distress for rent may be made either by the person to whom it is due, or by his bailiff, that is, an agent authorized by him to make the Dis-

tress. If made by the person himself to whom the rent is due, whether he be the lord distraining for a rent-service, or the grantee of a rent-charge, or the lessor distraining for rent reserved on lease, no particular form is required for making the Distress. The most proper way of making it, is however for the landlord to go upon the premises demised, and take hold of some piece of furniture, or other personal chattel found thereon, and say, I take this table, (or whatever else it may be) in the name of all the other goods on these premises, as a Distress for the sum of £ ——— rent, due to me at ——— day last.

By his Bailiff.

If the Distress be made by a bailiff, it is necessary that he should be properly authorized to make it; for which purpose, the landlord should give to his bailiff a written authority, (or as it is usually termed a warrant of Distress) which may be in the following form. (*n*)

Warrant of Distress.

I hereby authorize and require you, to distrain the goods and chattels in the dwelling house, (or "in and upon the farm lands and premises") of A. B. situate at ——— in the county of ———, for ——— £, being —— year's rent, due to me for the same, at ——— last; and to proceed

(*n*) I am not aware of any authority to shew that the bailiff must have a *written* warrant of Distress; although it is certainly the most eligible mode of appointment, as being the most easily proved.

Higgs v Dixon 2 Stark 180. on producing a warrant to distrain which was in the hand writing of the defendant, the attesting witness must be called to prove it

CHAP. XII. thereon, for the recovery of the said rent, as the law directs. Dated the —— day of ——— 18—

Yours, &c.

To E. F. my bailiff. C. D.

Neither the warrant of Distress, nor indeed any other of the proceedings in making a Distress, requires a stamp, or to be under seal, although made by a corporation aggregate; (*o*) but the warrant must be signed by the person entitled to the rent, under whom the bailiff may afterwards justify, (or as it is termed, make cognizance) for the Distress in the replevin: in the case of a joint Distress, as by coparceners, the warrant must be signed by all the persons entitled to distrain. (*p*)

When the bailiff is thus provided with the requisite authority, he may proceed to make the Distress in the same manner as before prescribed for the landlord; only expressing, that he makes the Distress as the bailiff of the landlord, for rent due to him, and by virtue of an authority given to himself by the landlord for that purpose. For if the bailiff be required to shew the cause of making the Distress, he ought to do it; but if not required so to do, he may distrain generally. (*q*)

(*o*) *Anonymous*, 1 Salk. 191. (*q*) *Butler's* Case, 1 Leon. 50.

(*p*) See ante, p. 55.

As the Distress may be made on all, or only on a part of the tenant's goods, (*r*) it is proper that he should know what goods the landlord intends to comprize within the Distress; that he may know what he will be obliged to replevy. And for this purpose, as soon as the Distress is made, whether by the landlord or his bailiff, an inventory of the goods distrained should be prepared in the following form.

An Inventory of the several goods and chattels distrained by me C. D. (or "E. F." the bailiff) the —— day of ——— in the year of our Lord, 18—, in the dwelling house, (&c.) of A. B. situate at ——— in the county of ———, (and if the Distress be made by a bailiff, say "by the authority and on the behalf of C. D.") for the sum of ———£ being —— year's rent due to me, (or, "to the said C. D.") at —— last.

IN THE DWELLING HOUSE.

In the parlour, one table, (&c.)

To this inventory should be subjoined the following notice to the tenant. (*s*)

(*r*) For if the landlord tortiously make an excessive Distress, he will be liable to the penalties of the statute of Marlebridge, for which see post, chap. 13.

(*s*) Esp. Ni. Pri. 419.

Mr. A. B.

Take notice, that I have this day distrained (or "that as bailiff to C. D. your landlord, I have this day distrained") on the premises above mentioned, the several goods and chattels specified in the above inventory, for the sum of ——£ being —— year's rent due to me, (or "to the said C. D.") at ——— last, for the said premises; (*t*) and that unless you pay the said rent, with the charges of distraining for the same, within five days from the date hereof, the said goods and chattels will be appraised and sold according to law. Given under my hand, the —— day of ——— in the year of our Lord, 18—.

Witness,

R. S. C. D.

The following form is applicable to the case of a Distress for a rent-charge.

Take notice, that by the order, and on the behalf of C. D. I have this day taken and distrained in and upon the farm and lands, called —— in your occupation, in the parish of ——— in the county of ——— all the corn, grain and effects in the

(*t*) If the distrainor secure the goods on the premises, under the authority of the 10th section of the stat. 11. G. 2. c. 19, the following clause may be introduced in this part of the notice ("and have secured the said goods and chattels in the stable, &c. on the said premises.")

But, if the Distress be of growing crops under the 8th and 9th sections of the same statute, the notice must of course be of a different kind. See post, p. 235.

inventory here under mentioned, for the sum of ——£ being —— year's annuity or rent-charge of ——£ per annum, due to the said C. D. at —— last, and charged on and issuing and payable out of certain manors farms lands and premises called —— in the parish of —— in the county of —— aforesaid of which the farm and lands first above mentioned are part and parcel, and that unless the said arrears of the said annuity or rent-charge, together with the expences of this Distress, are paid and satisfied, the said corn, grain and effects will be disposed of according to law. Dated (&c.)

E. F.

To Mr. A. B. and all whom it may concern.

This notice of Distress is preparatory to the sale of the goods, if not replevied, according to the stat. 2 W. & M. c. 5. s. 2. by which it is enacted, that where any goods shall be distrained for rent due upon any demise lease or contract, and the tenant or owner of the goods so distrained, shall not within five days next after such Distress taken, aud notice thereof (with the cause of such taking) left at the chief mansion house, or other most notorious place on the premises charged with the rent distrained for, replevy the same with sufficient security to be given to the sheriff according to law; that after such Distress and notice as aforesaid, and expiration of the said five days, the person distraining shall and may, with the sheriff

CHAP. XII. or under-sheriff of the county, or with the constable of the hundred, parish or place where such Distress shall be taken, (who are thereby required to be aiding and assisting therein) cause the goods so distrained to be appraised by two sworn appraisers (whom such sheriff, under-sheriff, or constable are thereby impowered to swear) to appraise the same truly, according to the best of their understandings; and after such appraisement, shall and may lawfully sell the goods distrained for the best price that can be gotten for the same, towards satisfaction of the rent for which the said goods shall be distrained, and of the charges of such Distress, appraisement and sale: leaving the overplus (if any) in the hands of the said sheriff, under-sheriff or constable, for the owner's use.

This notice of taking the Distress is not required by the statute to be in writing; and therefore a parol notice may be given, either to the tenant of the premises, or the owner of the goods distrained. (*u*) And although such notice is directed by the statute to specify the cause of the taking, it is not material whether it accurately state the period of the rent's becoming due, (*x*) or even whether the true cause of taking the goods be expressed therein, since a man may distrain for one cause, and justify for another. (*y*) If the notice be not per-

(*u*) *Walker* v. *Rumbold*, 12 Mod. Rep. 76.

(*x*) *Moss* v. *Gallimore*, Doug. 279.

(*y*) *Crowther* v. *Ramsbottom*, 7 T. R. 654. *Etherton* v.

sonally given, it should be left in writing at the tenant's house, or according to the directions of the statute, at the chief mansion house, or other most notorious part of the premises charged with the rent.

Of removing the Distress.

As soon as the Distress was made, it was formerly by the common law, the duty of the distrainor to remove the goods from the premises within a convenient time; and by the effect of the statute of 2 W. & M. c. 5. unless the goods distrained were corn, hay or straw, it was necessary to remove them immediately, (*z*) in order to impound them in some other place of safety: and the distrainor may still do so, if he think fit, giving notice to the tenant or owner, of the place to which they are conveyed. But now by the 10th section of the stat. 11 Geo. 2. c. 19. the distrainor is authorized to impound the goods distrained on any convenient part of the tenant's ground, to remain there during the space of five days, when they are to be sold, unless sooner replevied by the tenant. (*a*) But if the goods remain on the premises longer than the five days, without the tenant's consent, the distrainor, after the expiration of that time, becomes a trespasser. (*b*) As it is however in many cases desirable for the sake of the tenant,

Winchcombe v. Morgan 11 East 395

Popplewell, 1 East, 142. S. V. *Buller's* Case, 1 Leon. 50.

(*a*) Stat. 2 W. & M. c. 5. 11 Geo. 2. c. 19.

(*z*) *Dod* v. *Monger*, 6 Mod. Rep. 215.

(*b*) *Griffin* v. *Scott*, Ld. Raym. 1424. S. C. 2 Stra. 717.

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that the goods should not be sold so soon as the law permits, it is very usual for him to sign an agreement or consent to their remaining for a longer time on the premises, in the custody of the distrainor or a person by him appointed for that purpose. Such consent it is most proper, though not absolutely necessary to have in writing, and may be made in the following form.

Memorandum, that I, A. B. do hereby consent and agree, that C. D. my landlord, who hath distrained my goods and chattels for rent, in a dwelling house, (&c.) situate at ——— in the county of —— shall continue in possession of my said goods and chattels in the said dwelling house (&c.) for the space of —— days from the date hereof; the said C. D. having agreed to forbear the sale of the said goods and chattels for the said space of time, to enable me to discharge the said rent: and I the said A. B. do hereby agree to pay the expences of keeping the said possession. As witness my hand, the —— day of ——— in the year of our Lord, 18—. A. B.

The expences of keeping possession of the goods are said to be two shillings and sixpence per day to the man in possession, if the tenant maintains him, and three shillings and sixpence if he maintains himself. (*c*)

(*c*) Hunt's Gilbert, p. 334.

If such consent be given on the part of the tenant, then the goods should not be sold until the expiration of the time agreed upon, but otherwise, the stat. 2 W. & M. c. 5. directs them to be sold at the expiration of five days after the Distress, in the manner therein prescribed. (*d*)

Upon this clause of the statute it has been decided, that the five days may be inclusive of the *day* of sale, but must be exclusive of the *time* of it; so that, where the Distress was made on the morning of the 12th May, and the sale in the afternoon of the 17th, it was held to be regular: because the five days expired on the morning of the latter day. (*e*)

Of the Appraisement and Sale.

Before the goods are sold, the statute requires them to be appraised by two sworn appraisers, (whom the sheriff, under-sheriff, or constable may swear) but as this enables only the constable having jurisdiction in the place where the Distress is made, to administer such oath, in the case last cited, where the goods were distrained in the parish of A. but the appraisers were sworn before the constables of the parish of B. (both parishes being within the same hundred, but in different divisions, and each parish having different constables) it seems to have been doubted, whether

(*d*) V. ante, p. 221. Bl. 13.
(*e*) *Wallace* v. *King*, 1 H.

CHAP. XII. this were a compliance with the requisitions of the statute. (*f*) But where a Distress was made for the rent of land, part of which was situate in the hundred of Kinasley in Wiltshire, and the remainder in the hundred of Andover in the county of Southampton, and the two appraisers were sworn only in the hundred, and by the constable of Kinasley, but in the presence of the constable of Andover, it was held to be good; because the Distress was entire, and all the goods being impounded in the hundred of Kinasley, the impounding there was but a continuance of the original taking in both the hundreds; (*g*) and as the goods were all impounded in the hundred of Kinasley, the constable of that hundred was the proper officer within the statute. (*h*)

The persons chosen as appraisers must be disinterested in the Distress, and therefore where the party distraining was chosen one of them, it was held to be bad. (*i*) 1 Stark 172 Westwood v Cowne

The oath may be administered to the appraisers in the following form.

You, and each of you, shall well and truly appraise the goods and chattels mentioned in this Inventory, (the constable at the same time holding

(*f*) Ibid.
(*g*) *Walker* v. *Rumbold*, Ld. Raym. 53 S. C. 12 Mod. 76.
(*h*) S. C. 4 Mod. 395.
(*i*) Bull. Ni. Pri. 81.

the inventory in his hand, and shewing it to the appraisers) according to the best of your judgment. So help you God. CHAP. XII.

This oath should be administered in the presence of some person who may afterwards attest it; for which purpose, it is usual to make a memorandum thereof as follows.

Memorandum, that on the —— day of ——— in the year of our Lord, 18—. G. H. of ——— and J. K. of ——— two sworn appraisers, were sworn upon the holy evangelists, by me L. M. of ——— constable, well and truly to appraise the goods and chattels mentioned in this inventory, according to the best of their judgment. As witness my hand.

L. M. Constable.

Present at the time of swearing the said G. H. and J. K. as above, and witness thereto, { N. O. / P. Q.

To which should be added the appraisement as follows.

We the above named G. H. and J. K. being sworn upon the holy evangelists, by L. M. the constable above named, well and truly to appraise the goods and chattels mentioned in this inventory, according to the best of our judgment; and hav-

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ing viewed the said goods and chattels, do appraise and value the same at the sum of ——£. As witness our hands the —— day of —— in the year of our Lord, 18—.

Witness, G. H.

R. S. J. K.

Sworn appraisers. (*h*)

The memorandum of the oath and the appraisement are usually written on, or subjoined to the inventory.

The next thing to be done is to search the sheriff's office, to see if the goods have been replevied, and if they have not, and the rent and charges are still unpaid, then to sell the goods after they have been appraised in the manner before mentioned, for the best price that can be got for them: and apply the whole produce, if necessary, in satisfaction of the rent, and the expences of the Distress, appraisement and sale: or if there be any overplus, to leave the same in the hands of the sheriff, under-sheriff or constable, for the use of the owner of the goods distrained.

"When the goods are valued, it is usual for the "appraisers to buy them at their own valuation;

(*h*) The reader will readily perceive that in this and the preceding forms of this chapter, I have adopted those given by Mr. Tidd, in the last edition of his Practical Forms. I was indeed happy to borrow any thing, however trifling, from the pen of that valuable writer.

"and a receipt at the bottom of the inventory "witnessed by the person who swore them is usu- "ally held a sufficient discharge."

"But if the Distress be of considerable value, "it is much more advisable to have a proper "bargain and sale, between the landlord and the "person who swears them, the appraisors, and the "purchasor, for the better proving the transaction "afterwards, if there should be occasion." (*l*)

Where the Goods are taken in Execution.

I have before observed, that things taken in execution cannot be distrained, because they are already in custody of the law; if therefore the goods of the tenant are already taken under legal process, the landlord must not attempt to distrain them, but must give notice to the tenant in possession, of his claim for rent, under the stat. 8 Anne, c. 14. Such notice may be as follows.

To A. B. Esq. sheriff of the county of———

I do hereby give you notice, that there is now due to me from C. D. the person to whom certain goods belong, of which you are now in possession under and by virtue of a writ of *fieri facias*, (or as the case may be) returnable on ———, the sum of £———, for the rent of one year, (or other less period of time) and which sum I hereby give you notice to pay to

(*l*) Hunt's Gilbert, 338.

me before such goods be removed from the premises. Dated this —— day of ——

E. F. Landlord of the said premises.

This notice however, can only be given by the immediate landlord, for the statute of Anne does not entitle a ground landlord to his rent out of the goods of the under-tenant taken in execution. (*m*) But where the distrainor is entitled to rent under this statute, he must give notice of it to the sheriff, who is not otherwise bound to retain the rent on his account. (*n*)

Of a Distress in case of Fraudulent Removal.

I have hitherto considered the mode of conducting a Distress, where the goods to be distrained are found on the premises out of which the rent issues: but there is another course of proceeding to be adopted in those cases where the goods are fraudulently removed from the premises, in order to prevent a Distress. The two statutory provisions on this subject, as I have before had occasion to observe, are those contained in the stat. 8 Anne, ch. 14. s. 2. and 11 Geo. 2. c. 19. s. 1. by which, in the case of a fraudulent removal of the tenant's goods, the landlord or lessor is empowered, within thirty days after such removal, to take and seize them as a Distress, wherever they may be found, and afterwards to sell or dispose of them, in the same man-

(*m*) *Bennet's* Case, 2 Stra. 787.

(*n*) *Waring* v. *Dearberry*, 1 Stra. 97. *Palgrave* v. *Windham*, Id. 214. See further as to this statute, ante, p. 116.

ner as if they had been distrained on the premises demised,' (that is to dispose of them according to the stat. 2 W. & M. c. 5.) unless before that time sold to a *bona fide* purchaser. And a penalty is imposed on those assisting in such fraudulent concealment or removal, of double the value of the goods so concealed or removed: "provided, that "in case such goods do not exceed the value of fifty "pounds, the landlord or his agent may exhibit a "complaint in writing against such offender or "offenders before two or more justices of the peace "of the same county, riding or division of such "county, residing near the place whence such "goods and chattels were removed, or near the "place where the same were found, not being in-"terested in the lands or tenements whence such "goods were removed; who may summon the "parties concerned, examine the fact, and all pro-"per witnesses upon oath, or if any such witness "be one of the people called Quakers, upon af-"firmation required by law; and in a summary "way determine, whether such person or persons "be guilty of the offence, with which he or they "are charged; and inquire in like manner of the "value of the goods and chattels by him, her, "or them respectively so fraudulently carried off "or concealed as aforesaid; and, upon full proof "of the offence, by order under their hands and "seals, the said justices of the peace may and "shall adjudge the offender or offenders to pay "double the value of the said goods and chattels,

CHAP. XII. "to such landlord or landlords, his, her, or their "bailiff, servant, or agent, at such time as the said "justices shall appoint. And in case the offen- "der or offenders, having notice of such order, "shall refuse or neglect so to do, may and shall by "warrant under their hands and seals, levy the "same by distress and sale of the goods and "chattels of the offender or offenders; and for "the want of such distress, may commit the of- "fender or offenders to the house of correction, "there to be kept to hard labour, without bail or "main prize, for the space of six months, unless "the money so ordered to be paid as aforesaid "shall be sooner satisfied."

By the succeeding section, a right of appeal is given from such order to the justices of the quarter sessions, who are authorized to give costs to either party, and whose determination is to be final; provided, that where the party shall enter into a recognizance with sufficient surety, in double the sum ordered to be paid, with condition to appear at the quarter sessions, such order shall not be executed against him in the mean time.

The seventh section, as I have before stated, (*o*) provides, that where the goods fraudulently removed, shall be locked up or secured in any house, barn, stable, outhouse, yard, close or place, the

(*o*) V. ante, p. 137.

landlord or his bailiff may break open, seize and distrain them, first calling to his assistance the constable, headborough, borsholder, or other peace officer, and in case of a dwelling house, oath being first made before a justice, of a reasonable cause to suspect that such goods are concealed therein. (*p*) CHAP. XII.

Distress of Corn, Hay, or Straw, under stat. of Wm. & Mary.

Before we proceed to consider the general duty of the party distraining, with regard to impounding the Distress, it will be proper to take notice of the provisions of two statutes, which have rendered certain things distrainable, which were not so at the common law; but at the same time, have directed them to be disposed of in a particular manner. I mean the third section of the statute of 2 W. & M. ch. 5. s. 3. which enables the person to whom rent is due on any demise lease or contract, to seize and secure any sheaves or cocks of corn, or corn loose or in the straw, or hay lying in a barn or granary, or on a hovel stack or rick or otherwise, upon any part of the land or ground charged with the rent, and to lock up and detain the same in any place where the same shall be found, and after appraisement, authorizes the sale of the goods, if not replevied: provided, that corn, grain or hay so distrained, be not removed by the person distraining, to the damage of the owner thereof, out of the place where the same shall be found and

(*p*) See in Burn's Justice, tit. Distress, the forms applicable to proceedings before a justice of the peace, under these clauses of the statute relative to a fraudulent removal.

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seized; but be kept there (as impounded) until the same shall be replevied or sold, in default of replevying the same within the time aforesaid.

Distress of growing Crops under stat. 11 Geo. 2. c. 19.

The other provision to which I allude, is contained in the 8th and 9th sections of the stat. 11 Geo. 2. c. 19. authorizing the landlord or lessor to take and seize all sorts of corn and grass, hops, roots, fruits, pulse, or other product growing on any part of the premises demised, as a Distress for arrears of rent; and the same to cut, gather, and lay up, when ripe, in the barn or other proper place on such premises; and in case there shall be no barn or proper place on the premises, then in any other barn or proper place, which such lessor or landlord shall procure for that purpose, and as near as may be to the premises, and in convenient time to appraise sell or otherwise dispose of the same, towards satisfaction of the rent, and of the charges of such distress appraisement and sale, in the same manner as other goods may be seized, distrained and disposed of; the appraisement thereof to be taken when cut and gathered, &c. and not before.

Provided, that notice of the place where the goods so distrained shall be lodged or deposited, shall, within the space of one week, be given to such lessee or tenant, or left at the last place of his abode; and that if after such Distress, and at any time before the crops distrained shall be ripe

and cut, the tenant, his executors, &c. shall pay to the lessor or landlord, or his steward or other person usually employed to receive the rent of such lessor or landlord, the whole rent in arrear, together with the costs and charges of the Distress; that then upon such payment or lawful tender thereof actually made, such Distress shall cease, and the things so distrained shall be delivered up to the tenant. CHAP. XII.

The reader will observe, that in this case of a Distress of growing crops, the notice of the place where the goods are deposited must be given to the tenant, or left at his last place of abode, within one week after such deposit; but of course is not to contain any notice of sale. It is sufficient that it specify the cause of the taking, and the place where the goods are lodged.

Of Impounding the Distress.

Having premised these two exceptions to the general law which prevails with regard to the impounding of the Distress, we may proceed to consider, what is in other cases, the duty of the distrainor in this respect. "At common law, a man "might have impounded his Distress in what "county he pleased; but this was found very in- "convenient to the owner, who was thereby at a "loss where to find his beasts either to feed or "replevy them. This mischief was therefore pro- "vided against by the statute of Marlebridge, ch. "4. "*Nullus de cætero faciat ducere distric-*

CHAP. XII. "*tiones quas fecerit, extra comitatum in quo captæ "fuerint.*"

"Yet upon this statute it hath been held, that "where the tenancy is in one county, and the ma- "nor in another, the lord may drive the Distress "to the manor pound, though it be out of the "county where the Distress was taken; because "the tenant by attending the manor court, is pre- "sumed to know every thing transacted in the "manor; and therefore this case is out of the "chief provided against by that law." (*q*)

The statute of Marlebridge confined the impounding of the Distress to the same county, and by the later statute of 1 & 2 Ph. & M. c. 12. it is enacted, that no Distress of cattle shall be driven out of the hundred, rape, wapentake or lathe where such Distress shall be taken, except to a pound overt, within the same shire, not above three miles distant from the place where such Distress is taken. And that no other cattle, or other goods distrained for any cause at one time, shall be impounded in several places, whereby the owner of such Distress shall be constrained to sue several replevies for the delivery of such Distress: and that every person offending contrary to that act, shall forfeit to the party grieved, for every such offence, a hundred shillings and treble damages. And by the

(*q*) Gilb. Distr. p. 70. 2 Inst. 106. 238. And see post, p.

same statute it is further enacted, that no person shall take more than four pence for impounding a Distress, and where less hath been used, shall take less, under a penalty to the party grieved of £5, together with the excess of the sum taken.

As this statute expressly enjoins the Distress not to be driven out of the county, it cannot be carried into another county, although it be to the nearest pound, and within three miles from the place of the Distress. (*r*) But where one Distress was made for an entire rent, issuing out of two adjoining parcels of land, in different hundreds and different counties, there in respect of the Distress being entire, it was held that the goods distrained in both hundreds, might properly be impounded in one of them. (*s*) If however the entire rent had issued out of two parcels of land, situate in different counties, not adjoining to each other, as Middlesex and Hampshire, the Distress could not have been driven from one to the other. (*t*) And where the Distress was made in the hundred of Offlay in Staffordshire, and afterwards impounded within the city of Litchfield; (which was formerly within the hundred, but was afterwards by letters patent made a county of itself;) it seems to have been considered as irregular within this statute. (*u*)

(*r*) *Woodcroft* v. *Thompson*, 3 Lev. 48. *Gimbart* v. *Pelah*, Stra. 1272.

(*s*) *Walker* v. *Rumbold*, Ld. Raym. 53. S. C. 12 Mod. 76.

(*t*) Per Holt, ibid.

(*u*) Gouldsb. 100.

CHAP. XII. But as it is said that a general statute does not repeal a particular prescription, if a manor in one county be held of a manor in another county, the lord may prescribe to drive the Distress from the one to the other. (*x*) And where a Distress was made in Wiltshire, in a place within the honour of Wallingford, which is in the county of Berks, and afterwards driven into Berkshire, it seems to have been held good. (*y*)

Very few causes have however arisen under this statute, with respect to carrying the Distress to a distant pound, since the act of the 11 Geo. 2. c. 19. the 10th section of which authorizes any person lawfully taking a Distress *for any kind of rent*, to impound or otherwise secure the Distress, of what nature or kind soever, in such place, or on such part of the premises chargeable with the rent, as shall be most fit and convenient for the same, and to appraise, sell and dispose of it as might before have been done, in the case of a Distress taken off the premises; and that any persons may go to such place or part of the premises, in order to view, appraise and levy the goods distrained, and carry off or remove the same, on account of the purchaser thereof.

The Pound, or inclosure in which the goods distrained are to be deposited, is either a pound

(*x*) *Knolls* v. *Soley*, Palm. 32. 544, arguendo. Bro, Distr. pl.

(*y*) *Anonym.* Dyer, 168. b.

overt, or a pound covert. The former is a pound the sides of which are partly open, so as to permit the owner of the things distrained to see them, and if necessary, (as in the case of cattle) to have access to them, for the purpose of feeding and tending them. A pound covert is one covered at least overhead, and sometimes a complete inclosure.

If the things distrained be household goods, or any thing else capable of being damaged by the weather, or of being easily carried away, it is the duty of the distrainor to impound them in a house, or other inclosed place, in which they may be kept in safety, and free from damage: for if he put them into a pound overt, he must be answerable for them. (*z*) But cattle ought to be put into a pound overt; in which it is the duty of their owner to feed and tend them, for if they are put into a pound covert, (that is a complete inclosure, as a barn or stable) they must be sustained by the distrainor, who is not entitled to any satisfaction for the expence; and if they die for want of proper food and care, he must answer for them. (*a*) But if they are stolen from a pound overt, he is not answerable for them, because such a pound is a proper one for the impounding of cattle; (*b*) and if they die in a pound overt, without the distrainor's fault, he may make

(*z*) Co. Litt. 47. b.
(*a*) Ibid.
(*b*) *Vaspor* v. *Edwards*, 12 Mod. 662.

CHAP. XII. another Distress. (c). But he must merely put the cattle into the pound, without attempting to confine them therein, in any manner by which they may be damaged; so that, if a horse leap over the pound, and he is afterwards tied within it by a rope, with which he strangles himself, the distrainor is liable to make satisfaction. (d) So if he put a horse into a pound with spikes, by which the horse wounds himself, it is said that the distrainor shall be liable, because even a public pound is, for the time being, the pound of the distrainor, and he shall therefore be answerable for its being a safe and proper one. (e)

If cattle be impounded in a common public and open pound, it seems that the owner of them is bound to take notice of it; but if they are put into a private pound, then notice of the place of such impounding must be given to him by the distrainor. (f) And in the case of a Distress of growing crops, a particular notice, as we have before seen, is required by the stat. 11 Geo. 2. c. 19. (g) When the thing is impounded, whatever it may be, the distrainor cannot use or work it, whether it lie in a pound overt, or covert; because the distrainor has only the custody of the thing as a pledge, but has no right to make use of it; although the owner may make what profit of it

(c) S. C. 1 Salk. 248. Mod. 660.
(d) 1 Roll. Abr. 673.
(e) *Vaspor* v. *Edwards*, 12 Mod. 660.
(f) Co. Litt. 47. b.
(g) V. ante, p. 235.

he can, whilst it remains there. (*h*) The common law in this respect was so strict, that if the distrainor made any use of the Distress, it rendered him a trespassor *ab initio.* (*i*) This is indeed now altered by the stat. 11 Geo. 2. c. 19. s. 19. but he is still liable to an action to recover damages for such abuse. And every use of the thing distrained is considered as an abuse of it, so that it cannot be justified, even by its being beneficial to the Distress itself. For although it has been said, that where a man distrains armour, he may cause it to be scoured, to avoid rust; or if he distrain raw cloth, may cause it to be fulled, because it is for the owner's benefit; (*k*) yet in the same case it was decided, that raw hides could not be tanned, although alleged to have been done to preserve them from rotting. And the principle has been carried so far, that it seems to be the better opinion, that even milch kine cannot be milked by the distrainor, in order to prevent them from being damaged: because the owner would perhaps have come to milk his cattle before they had sustained any material injury; and it is not necessary for the security of the distrainor, who if the cattle die without his default, may make another Distress. (*l*)

(*h*) Gilb. Distr. 73.

(*i*) *Dod* v. *Monger*, 6 Mod. 216.

(*k*) Per Popham, Just. *Duncomb* v. *Reeve*, Cro. Eliz. 783.

(*l*) Roll. Abr. 673. and the cases cited in note (*a*) to Hunt's Gilb. Distr. p. 73.

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In the case of a Distress of growing crops, it is (as we have seen) (*m*) expressly provided by the stat. 11 Geo. 2. c. 19. s. 9. that if the arrears of rent with the full costs and charges of the Distress, be tendered to the party distraining before the crops are ripe and cut, cured or gathered, then the Distress is to cease, and they are to be redelivered to the tenant. And in all cases of Distress, if after making the Distress, but before it is impounded, a tender be made of the arrears of rent due, together with the expences of the Distress; the distrainor can no longer justify detaining the goods, but must redeliver them to the tenant or owner. (*n*)

Of the manner of making and disposing of Distresses, taken for other causes than that of rent.

Of disposing of a Distress at Common Law.

As a Distress, at common law, was only in the nature of a pledge, which could neither be used, or disposed of for the profit of the party distraining; it is a general rule, that no Distress at common law, except that for fines and amerciaments in a court-leet, can be sold, or in any other manner converted to the use of the distrainor. For the provisions of the act of William and Mary, and other later statutes, which authorize the sale of Distresses for rent, extend only to that particular

(*m*) V. ante, p. 234.

(*n*) 2 Inst. 107. *Six Carpenters'* Case, 8 Rep. 146. b.

kind of Distress: and all others therefore remain in this respect, as they were originally at the common law; and consequently cannot be sold or otherwise made use of, for the profit of the party distraining. The manner of disposing of them is therefore in general only to impound them, where they are to remain until replevied by their owner. CHAP. XII.

There are however some cases, in which by custom such Distresses may be sold, and this happens most frequently where the Distress itself is warranted only by custom, which authorizes both the Distress and the sale. Thus a Distress *pro certo letæ*, can be made only by prescription or custom: (*o*) but the same custom may authorize the sale of such Distress. And the same rule will apply to a Distress for an amerciament made in a court-baron. (*p*) For in general a custom sufficient to warrant the Distress, is sufficient to warrant its sale: this is not however universally true, for although a by-law may authorize a Distress to be made, it cannot authorize it to be sold. (*q*) So if a custom be alleged for the lord of a manor to detain a Distress taken on his demesne lands, until he be paid a fine at his pleasure, this cannot be supported, for such a custom is unreasonable and void. (*r*) But where a

(*o*) V. ante, p. 171. *Bullen* v. *Godfrey*, 1 Rolf. Rep. 76.

(*p*) *Rex* v. *Speed*, Salk. 279.

(*q*) *Clark* v. *Tucket*, 2 Vent. 183.

(*r*) The Case of *Tanistry*, Dav. Rep. 32.

CHAP. XII. Distress is made for a purpose of public benefit, as to punish a nuisance, it is said, that the power of Distress shall be construed most favourably for the public advantage, and therefore the things distrained may be sold. (*s*) A similar observation may be applied to all cases in which a Distress is made, not for the purpose of compelling the performance of a duty, but of enforcing the payment of a penalty or other specific sum of money: for otherwise the Distress might be an ineffectual remedy. This rule however can extend to few cases, except those regulated by some particular custom, or where the Distress is in the nature of an execution, in which latter case, it is commonly made under some statutory provision, which either expressly or by implication authorizes both the Distress and the sale. (*t*)

Of impounding the Distress at Common Law.

The manner of impounding such Distresses materially differs in one respect from that of a Distress for rent; and may in some other cases depend on particular custom, varying from the mode prescribed by the common law. For all kinds of Distresses are within the statute of 1 & 2 Ph. & M. c. 12. directing the Distress to be impounded in a pound, within three miles from the place of the Distress, and in the same county: but the statute of 11 Geo. 2. c. 19. s. 10. authorizing the Distress

(*s*) *Rex* v. *Speed*, Salk. 379. 733, *Anonymous*, Sir Thomas Jones, 25. 2 Inst. 738.
(*t*) Bl. Comm. 3, 14. and see *Arris* v. *Bradshaw*, 1 Keb.

to be impounded on any convenient part of the land distrained upon, extends only to Distresses for rent; and therefore all other Distresses must be regulated, as to the impounding, by the former statute of 1 & 2 Ph. & M. c. 12. (*u*) In some cases however, even by the ancient common law, a distrainor was entitled to impound the Distress on the land: for it is said, that if the lord or lessor distrain beasts damage-feasant on their tenant's land, they may not impound them on the land itself; but if such Distress be made on their own lands, then the cattle may be impounded thereon. (*x*) And it should seem, that notwithstanding the statutes of Marlebridge, and 1 & 2 Ph. & M. which direct the Distress to be impounded within the same county, yet where it is made for suit or service upon the land of a tenant in one county, held of a manor in another, the cattle distrained may be driven to and impounded in the latter county, within the manor: (*y*) because the tenant knows where he owes his suit and service, and can be at no loss to find or replevy his cattle; for as Lord Coke observes upon this point, a case which is out of the mischief of a law, is out of its meaning, although within the letter of it. (*z*) CHAP. XII.

(*u*) For which, and the decisions upon it, see ante, p. 236. and post, chap. 13.

(*x*) Bro. Abr. Distr. pl. 30.

(*y*) Bro. Abr. Distr. 33, 54.

(*z*) 2 Inst. 106. As Lord Coke cites this case as law after the statute of Ph. & M. it seems that he considered it as not more affected by that act than by the statute of Marlebridge. Indeed the two acts were made *in pari materiâ*, and Lord Coke's reason ap-

CHAP. XII.

Of Impounding by Custom.

In some cases, the manner and place of impounding may be regulated by particular custom; thus where it appeared to be the custom of a manor, for the bailiff, at certain times, to drive the tenant's cattle feeding on the waste, in order to ascertain whether any of them had surcharged the common, and if such surcharge were found, to distrain the cattle surcharging, as damage-feasant, and impound them in any place within the manor; it was held that such a custom was good. (*a*)

Of a Distress for a Fine or Amerciament in a Court-Leet.

In the case of a Distress for a fine or amerciament at a court-leet, it appears to have been sometimes doubted, whether it were necessary for the bailiff to have a special warrant to make the Distress; (*b*) but the better opinion seems to be, that such a warrant is requisite. (*c*) And indeed as this Distress is in its nature a process of execution on the judgment of a court, it is not reasonable that such process should be executed by any one but an officer or bailiff of the court, delegated for that purpose.

This kind of Distress, as I have already observed, differs in one respect from other Distresses at common law, inasmuch as it may, if necessary, be

plies equally to both of them. And see ante, p. 236 & 238.

(*a*) *Follet* v. *Troake*, Ld. Raym. 1186.

(*b*) *Pierson* v. *Ridley*, 2 Keble, 745.

(*c*) *Scroggs* v. *Stephenson*, Moore, 573. S. C. 607. S. C. Cro. Eliz. 698. *Bowleston* v. *Alman*, Id. 748.

sold; because it is in effect a species of execution to levy a certain penalty. There is indeed another reason, derived from the prerogative of the king, whose courts all leets originally were, and therefore its fines or amerciaments have been considered as debts due to the crown which might always be levied by distress and sale. (*d*) For the latter reason however it has been doubted, whether the private lord of a leet, can of common right, sell the Distress made for a fine or amerciament in his court; because it has ceased to be the court of the king, and is therefore no longer affected by the prerogative: (*e*) but the better opinion seems to be, that whether the court-leet be in the hands of the king or a subject, such a Distress may be sold. (*f*) It should however be detained for a reasonable time, which in this case is said to be about sixteen days, (*g*) to afford to the person distrained upon, an opportunity of redeeming or replevying his goods; which if not done during that time, the Distress may at the expiration of it be disposed of by sale, in order to pay the amount of the fine or amerciament and the expences of the Distress: the overplus (if any) to be rendered to the owner of the

(*d*) Bro. Distr. pl. 72. Bl. Comm. 3, 14.

(*e*) *Commin* v. *Carre*, Hetl. 62.

(*f*) Ibid. and *Howett* v *Norberow*, 1 Bulstr. 53. *Griesley's* Case, 8 Rep. 41. Bro. Distr. pl. 40.

(*g*) *Commin* v. *Carre*, Hetl. 62. This period of fifteen or sixteen days seems to have been fixed upon from the analogy between a Distress for an amerciament, and a distress for a debt due to the king or other lord; respecting which, the ancient statute *de districtione scaccarii* 51 Hen. 3. stat. 4. enacts that the Distress shall not be sold within fifteen days.

goods distrained. During the time of detaining such Distress, it ought to be safely impounded, (*h*) according to the directions of the statute of Philip and Mary.

It must however be remembered, that this power of selling the Distress for a fine or amerciament, belongs only to a court-leet; but for an amerciament in a court-baron, the Distress cannot be sold without a special custom or prescription to warrant such sale. (*i*)

Where several amerciaments are due for distinct offences, (as I have before observed) a Distress should not be made for the entire sum, but each amerciament should be separately levied. (*k*)

(*h*) *Grieslay's* Case, 8 Rep. 41.

(*i*) *Trye* v. *Burgh*, Noy 17.

(*k*) Ante, p. 178.

CHAPTER XIII.

Of a wrongful, irregular, or excessive Distress, and of the several Remedies for the same.

A DISTRESS may be either wholly, or partially, unlawful. It is indeed a rule of the common law, that any irregularity committed in the proceedings of a Distress, renders the party distraining a trespasser *ab initio;* but this has been in various instances modified by particular statutes appointing specific remedies for the injuries complained of, and (as I have before observed) in the case of a Distress for rent, has been totally changed by the stat. 11 Geo. 2. c. 19, which establishes the more equitable principle, that the person aggrieved by any irregularity in the Distress, shall be entitled to recover damages proportioned to the injury sustained.

For the purpose of considering the nature of illegal Distresses, and the remedies provided for them,

CHAP. XIII. it will be convenient to divide them into three kinds, namely wrongful, irregular, and excessive distresses.

Of a wrongful Distress.

A Distress may be denominated wrongful, either by being tortious in its very inception, or by being rendered so by its unlawful continuance. If, therefore, a Distress be made by a person who has no right to make it, as by a landlord for rent, when in fact no rent is due, or a Distress be unlawfully taken in the highway, it is so entirely wrongful, that the law permits the person whose goods are so distrained, to redress himself, by retaking them out of the hands of the trespasser; (*l*) and a Distress being in the first instance, only a means of compelling satisfaction, if such satisfaction be tendered at the time the Distress is about to be made, that renders the subsequent Distress altogether wrongful. Thus, if a man come to distrain for rent in arrear or damage-feasant, and before the Distress, a tender be made of the arrears of the rent, or sufficient amends for the damage with the costs (if any) of the Distress; a subsequent Distress is altogether tortious, and the tenant or owner may immediately rescue his property from the hands of the distrainor. (*m*) And if in the case of rent in arrear or damage-feasant, the person whose goods are distrained, do after the Distress, and be-

(*l*) Co. Litt. 47. b. 160. b.
(*m*) Ibid. See further as to the right of rescuing a Distress, post chap. xiv.

fore the impounding, tender a sufficient satisfaction for such arrears or damage done, together with the charges of the distress, the subsequent detainer of goods becomes unlawful: and in such case it seems, that the owner of the goods may rescue them, without being deemed a trespassor: (*n*) but this must be done before any part of the goods is impounded, (*o*) as they are afterwards in the custody of the law. For as Lord Coke concisely expresses it, "Tender upon the land before the Distress, "makes the Distress tortious; tender after the Dis- "tress, and before the impounding, makes the de- "tainer and not the taking wrongful; tender after "the impounding, makes neither the one nor the "other wrongful, for then it comes too late, be- "cause then the cause is put to the trial of the law, "to be there determined." (*p*)

With respect to a Distress of growing crops, under the stat. 11 G. 2. c. 19, I have before observed, that there is in that statute a particular provision with respect to a tender of the arrears of the rent, it being by the 9th section enacted, that if at any time before such crops are ripe and cut, cured or gathered, all such arrears, together with the costs of the Distress shall be paid, then the Distress shall

(*n*) *Bevill's* Case, 4 Rep. 11 b. *Firth* v. *Purvis*, 5 T.R. 433.

(*o*) *Alwayes* v. *Broome*, 2 Lutw. 1262.

(*p*) *Six Carpenters'* Case, 8 Rep. 147. 2 Inst. 107. and see *Vaspor* v. *Edwards*, 12 Mod. 661. *Allen* v. *Bayley*, 2 Lutw. 1596, *Jennings* v. *Cousins*, Hetl. 165. *Hill* v. *Rushton*, 3 Keble, 190.

CHAP. XIII. cease, and such things distrained shall be redelivered to the tenant.

It is however said, that in the case of a Distress damage-feasant made by a bailiff or servant, it is not sufficient to tender the amends before impounding, to the person distraining, but that such tender should, if possible, be made to the owner of the land himself, unless indeed the Distress be made by the bailiff of a manor, who may perhaps be considered as authorized not only to make such a Distress, but finally to dispose of it. (*q*)

It is obvious, that where the owner of the goods distrained makes a rescue of them, he must make it at his own peril, for if it afterwards appear that the Distress was lawful, he will be liable to an action for an unlawful rescue; (*r*) and therefore, if there be any doubt respecting the legality of the Distress, it is most prudent not to attempt a rescue of it, but to wait until the goods are impounded, and then replevy them, or bring an action of trespass for the taking; in either of which cases, the right of making the Distress is the point to be tried, which if decided in favour of the owner of the goods distrained, will entitle him in the one case to a return of the Distress and damages for the detainer, or in the other, to damage proportioned to the value of his goods distrained.

(*q*) *Pilkington's* Case, 5 Rep. 76. *Pilkington* v. *Hastings*, Cro. Eliz. 813.

(*r*) Vide post chap. xiv.

Action on stat. of Wm. & Mary for a wrongful Distress.

In the case however of a Distress made for rent, where no rent is due, the owner of the goods distrained, has now a higher remedy than he had formerly by the common law. For by the stat. 2 W. & M. sess. 1. c. 5. s. 5. it is enacted, That in case any Distress and sale shall be made by virtue or colour of that act for rent pretended to be in arrear, and due, where in truth no rent is arrear or due to the person distraining, or to him in whose name or right such Distress shall be taken, that then the owner of such goods so distrained and sold, his executors or administrators, may by action of trespass or upon the case, to be brought against the person so distraining or his executors or administrators, recover double the value of the goods so distrained and sold, together with full costs of suit.

In an action on this statute, it seems to be sufficient for the declaration to allege, that the Distress was made for rent, supposed to be due upon a certain demise before then made by the defendant to the plaintiff, without specifying the particulars of the demise itself; and to state generally that it was taken for and in the name of a Distress, without adding for rent arrear. (*s*)

The person whose goods are wrongfully distrained, is not however compelled to resort to this statute for a remedy, but may, if he think proper, pay

(*s*) *Salter v. Brunsden*, 4 Mod. 231.

CHAP. XIII. the sum demanded, in order to redeem his goods, and after they are in his possession, bring an action of trover against the distrainor, for the unlawful taking. (*t*).

There are various other cases of wrongful Distresses provided for by the ancient statutes, especially by the statute of Marlebridge. Some of these, in consequence of the abolition of the military and villein tenures, have now become obsolete, but there are some provisions of the statute of Marlebridge and other statutes relative to Distresses made on the highway, or out of the fee or jurisdiction of the lord, or for services not due, &c. which are still in force. To what cases these several provisions now apply, I have formerly considered, at present it will be proper to inquire into the remedies upon them.

Action on the stat. of Marlebridge for a Distress out of the lords fee.

The first of these provisions, is that contained in the 2d and 15th chapters of the stat. of Marlebridge, by the former of which it is enacted, that "none shall "distrain any to come to his court, which is not of "his fee or upon whom he hath no jurisdiction, "by reason of hundred or bailiwick, nor shall take "Distresses out of the fee, or place where he hath "bailiwick or jurisdiction, and he that offendeth "against this statute shall be punished by fine, and "that according to the quantity and quality of the

(*t*) *Shipwick* v. *Blanchard*, 6 T. R. 298.

"trespass." A part of the 15th chapter is to the same effect. Upon the 2d chap. Lord Coke remarks that the clause which provides, that no man shall distrain any to come to his court but such as be within his fee, must be understood of suit-service in respect of a seigniory, and not of suit real in respect of resiance. And that the whole chapter is but a declaration of the common law, and therefore that if A. distrain B. and in a replevin A. avow as lord for rent or service, and B. pleads *hors de son fee*, and it is found for B., A. shall not in this replevin be punished by ransom, &c. (that is by fine as at common law,) but that the party grieved must have an action upon this statute. (*u*) CHAP. XIII.

This provision of the statute of Marlebridge was confirmed by the 16th chapter of the statute of Westminster primer, 3 Edw. 1. which enacts, that persons who take beasts wrongfully and distrain out of their fee, shall make heavy fine, and be more grievously punished if the matter of the trespass do so require.

Upon which Lord Coke observes, that the stat. of Marlebridge, c. 4. speaks only of Distresses, but this latter statute of all manner of takings, that the former statute prohibits such Distresses generally,

(*u*) 2 Inst. 104.

CHAP. XIII. whereas the latter extends only to the taking of cattle. (x)

Upon the provisions of these statutes it therefore seems, that unless an action be brought upon a Distress of cattle for the additional penalty inflicted by the statute of Westminster primer, it must be brought on the 4th chapter of the statute of Marlebridge, which action is explained by Fitzherbert, to be founded on a special writ of trespass. For as Lord Hale observes, the party grieved shall not have advantage of the statutes of Marlebridge, except by a special writ founded on the statute, and not by a general writ of trespass, because in a special writ the party makes a fine to the king. (y) This writ recites the provision of the statute, and concludes with a precept to the sheriff, in the mean time to deliver the cattle distrained to the plaintiff, to which he is entitled upon this writ, as upon a replevin. (z)

Action on the stat. of Marlebridge for a Distress taken in the highway.

The other provision of the statute of Marlebridge, to which I have referred, is that contained in the 15th chapter, which enacts, that "it shall be lawful "for no man, for any manner of cause, to take "Distresses out of his fee, nor in the king's high-"way, nor in the common street, but only to the "king, or his officers having special authority to "do the same."

(x) 2 Inst. 191.
(y) Note (b) F. N. b. 90.
(z) F. N. B. ut supra, Register. Brev. 97. b.

It has been already observed, that a Distress taken in the highway is so completely unlawful, that it may be rescued by its owner; (*a*) but if he seek any further remedy for this offence, he must bring an action on the statute of Marlebridge, for as Lord Coke observes, the plaintiff cannot avail himself of the statute by pleading it in bar to an avowry, for then the king would lose his fine. (*b*).

This action, like that for distraining out of the lord's fee, is founded on a special writ of trespass, upon which the plaintiff is immediately entitled to a return of his goods. (*c*)

Of a wrongful Distress in ancient Glebes, &c.

It may here be proper shortly to mention another statutory provision relative to the taking of Distresses in the highway, or in ancient glebes, which belongs only to ecclesiastical persons. It is contained in the 9th chapter of the *Articuli Cleri*, 9 Edw. 2, which, reciting that the king's officers, as sheriffs and others, do enter into the fees of the church to take Distresses, and sometimes take the parson's beasts in the king's highway, where they have nothing but the land belonging to the church, declares that thenceforth such Distresses shall neither be taken in the king's highway, nor in the fees wherewith churches in times past have been endowed; although Distresses may

(*a*) Ante p. 250, and *Smith* v. *Shepherd*, Cro. Eliz. 710.

(*b*) 2 Inst. 131.

(*c*) F. N. B. 90.

CHAP. XIII. be taken in possessions of the church newly purchased by ecclesiastical persons.

Upon which Lord Coke observes, that the statute of Marlebridge extends only to laymen, and this statute to men of the church, and that this appears by the register; for if a layman bring an action upon the statute for distraining in the king's highway, he counts upon the statute of Marlebridge, but a parson upon the statute of the *Articuli Cleri*. (*d*)

Lord Coke adds, that parsons are here named but for examples, for that the act extends to abbots, priors, and the like, but that it binds not the king distraining for any debt or duty due to him. (*e*)

With respect to a Distress made on the glebe, as the statute is expressly confined to such glebes as were ancient at the time of passing the act, it must in this respect be nearly if not altogether obsolete.

The proceeding upon this statute appears to be either by attachment, or writ of prohibition; and it seems that the parson may have an attachment against the sheriff for making a Distress in his glebe, without first having recourse to the writ. The writ itself enjoins the sheriff not to make any

(*d*) 2 Instit. 627. (*e*) Ibid.

further Distress on the parson, and also to deliver up to him the Distress already taken. And if after suing out this writ, any further Distress be made, the parson may sue out an *alias* or *pluries*, and afterwards have an attachment thereon. (*f*)

Another species of wrongful Distress, for which a remedy is given by the statute of Marlebridge, is that of a Distress made for services which are not due, respecting which it enacts that, "if any distrain "his tenant for services and customs being due "unto him, or for any other thing for which the "lord of the fee hath cause to distrain: and after "it is found that the same services are not due, "the lord shall not therefore be punished by fine, "if he suffer the Distresses to be delivered accord-"ing to the law and custom of the realm, but "shall be amerced as hitherto hath been used, and "the tenant recover his damages against him."

Action on the stat. of Marlebridge for a Distress for services not due.

This branch of the statute, says Lord Coke, is interpreted that the lord shall pay no fine, and therefore since this act, no action of trespass *quare vi et armis* lies against the lord in this case, for then he should pay a fine. (*g*) But he adds, that this is to be intended where the lord himself distrains, for if his bailiff take a distress where nothing is behind, there an action of trespass *quare vi et*

(*f*) F. N. B. 173, 174. (*g*) 2 Inst. 105.

arrear lieth against him, because the bailiff is not *dominus*; and so it is against a guardian in socage. But if the lord do a tortious act, not in respect of his seigniory, then an act of trespass lies against him. (*h*) And therefore upon the same principle, it should seem that in the three last cases the tenant may replevy the Distress, and then plead the special matter in bar to the avowry.

Notwithstanding this statute, if the lord distrain for services where none are due, the tenant may make rescue of his goods, as in the case of Distress for rent, where none is in arrear. (*i*) But it was formerly held, that if the lord by encroachment obtained a seisin of more than was due, the tenant could not rescue the distress, nor even avoid the encroachment in a replevin, unless it were against the lord's successor, or the issue in tail: but if the lord distrained for the rent or service really due and the encroachment also, (that is, as it should seem, not having seisin of the encroachment) it was held that the tenant might tender what was really due, and then make rescous, if the lord would not accept it, without being put to a writ of *ne injustè vexes*, or *contra formam feoffamenti*. So the encroachment might be avoided in an action brought by the lord for the rescous, or in trespass brought by the tenant for the Distress of the sum,

(*h*) Ibid. and *Gomle's* Case, 9 Rep. 76.

(*i*) *Bevill's* Case, 4 Rep. 11 b.

encroached, and which was not justly due. But if the lord encroached by *coercion of Distress* more than was due to him, the tenant was permitted, by pleading in replevin, to avoid a seisin so viciously obtained. (*k*) CHAP. XIII.

Action on the stat. of Marlebridge for an unlawful Distress of beasts of the plough.

It has been already observed, that even at common law, beasts of the plough were not to be distrained for any cause, whilst other goods could be found for the Distress. (*l*) This rule of the common law was however confirmed by the ancient statute *De Districtione Scaccarii*, 51 Hen. 3. stat. 4. by which it is provided, "that no man of reli-"gion, nor other, shall be distrained by his beasts "that gain his land, nor by his sheep, for the king's "debt nor the debt of any other man, nor for any "other cause, by the king's bailiff or other person, "but until they can find another Distress or chattel "sufficient, whereof they may levy the debt, or "that is sufficient for the demand (except im-"pounding of beasts that a man findeth in his "ground damage-feasant, after the use and custom "of the realm.") And this provision is enforced by the *Articuli super chartas*, 28 Ed. 1. st. 3. ch. 12.

(*k*) Ibid. and 2 Inst. 21. The proceedings alluded to in the text may be considered as obsolete, but the reasoning founded upon them is still applicable to some cases not falling within the provision of the 22d section of the stat. 11 Geo. 2. c. 19.

(*l*) Co. Litt. 47. b. and see the ancient writers cited by Lord Coke, 2 Inst. 132, 133.

Distr. III. For this wrongful Distress of beasts of the plough, the tenant, if he pleases, may make rescous (*m*) or may have his remedy by an action on the statute, for there is no action at the common law. (*n*) And this is by a special writ of trespass for the taking of the plaintiff's beasts against the form of the statute. (*o*) Therefore the writ should not be for a taking *vi et armis*, but *contra formam statuti et contra pacem*. (*p*) And neither the writ nor the count needs allege that there was another reasonable Distress to be found, for the negative of this must be shewn by the other side; and indeed the conclusion *contra formam statuti* implies it. (*q*) The fact of there being other sufficient Distress must also be confined to the very time of making the Distress; for it is not material whether there were any such, either before or afterwards. (*r*) This writ, like that for taking a Distress on the highway, or out of the fee, contains a clause for the delivery of the cattle to the plaintiff, to which he is entitled upon issuing out the writ; (*s*) and if such a Distress be made for rent in arrear, and afterwards the tenant in order to regain his beasts of the plough, tender or even pay to the lord the arrears, and thereby obtain a deliverance of them, although by such act he may seem to have affirmed

(*m*) Co. Litt. 161. a.

(*n*) *Porphrey* v. *Legingham*, 2 Keble, 290.

(*o*) F. N. B. 90.

(*p*) 2 Inst. 133. *Anon.* Dyer 312. 2 Keble, 290. ut supra.

Jemmott v. *Cowley*, 1 Sid. 344.

(*q*) *Anonymous*, Dyer, 312, Hale, note. F N.B. 90.

(*r*) 2 Inst. 133.

(*s*) F.N.B. 90. Regist. Brev. 97. b.

the distress, yet he may have his action for the offence against the statute. (*t*) CHAP. XIII.

The act itself extends to all kinds of Distresses, either at the suit of the king or a subject, (*u*) but not to executions for the levy of debt or duty, especially such as are imposed by subsequent statutes. (*x*)

There is another species of wrongful Distress, namely, that of taking a second time for a rent or service, the same cattle or other things before distrained for the same cause, the Distress having been replevied, and the plea in replevin being still pending. For this injury, the owner of the things so taken may have his writ of reception whether he be the tenant or a stranger. So if two men's cattle be distrained for a rent or service, and afterwards the cattle of one of them be again taken for the same cause, he may have such writ. But if the cattle of two different persons be at separate times distrained for the same cause, the owner of the second Distress cannot have this writ, because his cattle have not been twice taken. If such second Distress be made by the lord himself or by his bailiff by his commands or if made by his bailiff without his command but the lord afterwards assent to it, the writ must be brought against the Of the writ of recaption.

(*t*) 2 Inst. 133. Hale, note.

(*u*) 2 Inst. 133.

(*x*) *Hutchins v. Chambers*, 1 Burr. 579.

CHAP. XIII. lord himself; but if made by his bailiff without his previous or subsequent concurrence, an action of trespass, and not a writ of recaption, lies against the bailiff. (y)

This writ seems to be almost co-extensive with the ancient writ of assize, *de multiplici districtione;* for it is the opinion of Fitzherbert that it lies even where different cattle of the same tenant are taken for the same cause as a former distress. (z)

"And this writ lies for the tenant before avowry "made by the lord in the first replevin, for other- "wise the remedy would not be adequate, because "the lord might harass the tenant by several Dis- "tresses, before the lord by the rules of the court "could be compelled to avow. But then the te- "nant must in his declaration on the recaption "aver that the second Distress was taken for the "same cause as the first, otherwise the tenant fails "in making out to the court his title to the writ of "recaption, and consequently cannot punish the "lord for taking the second Distress." (a)

The recaption however in some cases lies upon a Distress for rent accrued even after the first Distress; for if the lord avow for rent, and the tenant plead *hors de son fee*, if the lord pending that plea distrain for rent due at a subsequent day, the tenant may have a writ of recaption, because the lord's

(y) F. N. B. 71.
(z) Id. 72.
(a) Gilb. Distr. p. 238.

CHAP. XIII.

cattle shall be tried by the first plea; but if the tenant had pleaded *riens arrere* or levied by Distress, then pending that plea the lord might have distrained for subsequent rent, because the seigniory was thereby confessed; and therefore the tenant could not have a recaption. (*b*)

This writ lies where the plea is depending in the county before the sheriff, as well as where it is depending before the justices of record; and whether it be removed into the court above by *pone* or *recordari*. (*c*)

So if a man be distrained, and he sue a replevin by plaint, and pending that plea is distrained again for the same cause, a writ of recaption may be directed to the sheriff, who shall hold plea thereupon. But if he be distrained within a liberty, and he sue a replevin there by plaint or writ, and be again distrained, (pending plea there) he shall not have a writ of recaption; because the plea is pending neither before the sheriff nor the justices; and the writ of recaption cannot be directed to any but the sheriff. (*d*)

In a recaption, the defendant must not avow as in a replevin, but justify the taking as in an action of trespass; because the damages to be recovered in recaption, are only for the contempt which the

(*b*) F. N. B. 71.
(*c*) F. N. B. 72. where see the forms of the several writs.
(*d*) Id. 73.

CHAP. XIII. defendant has done against the law, and not for the taking or detaining of the cattle. And therefore, in a recaption it is not material whether the first Distress be lawful or not. (e)

If the writ of replevin be abated, then the writ of recaption also abates. And if the plaintiff in the recaption be nonsuited, the defendant is entitled to a return of the Distress. (f)

If the defendant in the recaption be convicted before the sheriff, he shall be amerced and pay damages to the party grieved for the contempt; if convicted before the justices, he shall pay such damages, but shall be amerced instead of being fined. (g)

Of an Irregular Distress.

I have already observed, that in general at the common law, if the distrainor committed an irregularity in conducting the Distress, he thereby became a trespasser *ab initio*. This rule however seems to have extended only to positive, and not to negative acts of irregularity. Because, as Lord Coke observes, "not doing is no trespass, and "therefore if the lessor distrains for his rent, and "thereupon the lessee tenders him the rent and "arrear, &c. and requires his beasts again, and "he will not deliver them, this not doing cannot "make him a *trespasser ab initio*." (h) So if the

(e) Id. 72.
(f) Id. 71. and Hale, note (a) ibid.
(g) Id. 73.
(h) *Six Carpenters'* Case, 8 Rep. 146. b.

act were positive, as that of unlawfully using apart CHAP. XIII.
of the goods distrained, even that rendered the distrainor a trespasser only as to that part of the goods so used. Thus where several barrels of beer were distrained for rent, and the distrainor drew beer out of one of them, Lord Holt held that it rendered him a trespasser *ab initio* only as to that single barrel. (*i*) However this rule of the common law, even with such limitations, occasioned great inconvenience, and rendered a distress a very hazardous proceeding, especially in the case of rent, in which as the Statute of 2 W. & M. sess. 1. c. 5. had authorized the things distrained to be sold in the manner therein directed, the proceedings under a Distress for rent were rendered so much more complicated than they had formerly been at the common law, that they became more hazardous, and therefore in many cases, less beneficial than they had been before: to remedy which inconvenience, it was by the stat. 11 Geo. 2. c. 19. s. 19, 20, 21. enacted, That where any Distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party so distraining, or by his agent, the Distress itself shall not be therefore deemed unlawful, nor the party making it be deemed a trespasser; but the person aggrieved by such unlawful act or irregularity, may recover full satisfaction for the special damage thereby sustained and no more, in an action of trespass or on the case, at the

(*i*) *Dod* v. *Monger*, 6 Mod. 215.

CHAP. XIII. election of the plaintiff; provided, that where the plaintiff shall recover in such action, he shall be paid his full costs of suit, and have all the like remedies for the same as in other cases of costs. Provided also, that no tenant or lessee shall recover in any action for any such unlawful act or irregularity as aforesaid, if tender of amends hath been made by the party distraining or his agent, before such action brought.

And by the succeeding section it is provided, that in any action of trespass or on the case brought against any person in respect of a Distress or sale made by virtue of that act, the defendant may plead the general issue, and give the special matter in evidence; and that if the plaintiff in such action shall become nonsuit or discontinue his action, the defendant shall recover double costs of suit.

It has however been determined, that a landlord cannot justify, "under the plea of the general issue "given by this act, except for acts done as land-"lord; and therefore, although he may justify as "far as the Distress goes, he cannot justify expul-"sion under this issue: so also if the goods conti-"nue on the premises beyond the five days, he "cannot justify under this issue, entering the house "to remove them afterwards; but must plead a "licence to justify the *asportavit*, or *liberum tene-"mentum* to justify the expulsion." (*k*)

(*k*) Hume's Gilbert, p. 83.

CHAP. XIII.

Irregularity in driving or impounding a Distress.

These provisions of the statute extend to all Distresses for rent, but not to Distresses for other causes, which are therefore still governed, with respect to an irregularity in their proceedings, by the rule of the ancient common law. There is however one particular, as to which a statutory provision had been made, which extends to Distresses in general. I mean, as to driving and impounding the Distress, according to the direction of the statute of 1 & 2 Ph. & M. c. 12. by the first section of which it is enacted, that any person offending against that act, (that is by driving Distresses out of the county, or impounding them in several places) shall forfeit to the party grieved for every such offence, an hundred shillings, and treble damages.

And the next section, enacting that no more than four pence shall be taken for impounding any one Distress, and when less has been used, then such smaller sum; imposes a fine of five pounds besides the excess of the sum taken beyond four pence, to be paid by the offender to the party grieved.

Upon the former of these sections it has been determined, that the penalty shall be referred to the offence, and not to the persons committing it, and therefore that there can be only one penalty for one Distress. So that if three persons be concerned in the driving of the Distress, only one penalty of five pounds and treble damages shall be

CHAP. XIII. forfeiture (k). For the offence is in its nature single, and therefore is such whether committed by one or several persons. (m) It was indeed said in the same case, by Fenner Justice, (n) that if the plaintiff had brought his action severally against each of the three persons driving the Distress, each should have forfeited the penalty; and in another case, (o) Lord Holt is reported to have said, that if a distrainor were to drive three beasts, belonging to different owners, each of them might recover from him a separate penalty; but both the latter opinions seem very questionable, and not easy to be reconciled with the principle established by the case first cited, that the penalty is single and entire like the Distress.

It was in the same case held to be error, that the venue was awarded only of the place where the taking was, and for this cause, judgment was reversed. (p) And now perhaps according to the statute of 21 Jac. 1. c. 4. the action may most properly be brought in the county within which the impounding is made. It must however be observed, that Lord Hale with reference to the action founded on the fourth chapter of the statute of Marlebridge for the same offence, says that in a case where the defendant denied the driving into

(l) *Partridge* v. *Emson*, Noy, 62. *Partridge* v. *Naylor*, Cro. Eliz. 130.

(m) *Hele* v. *Charke*, Cowp. 62.

(n) Noy, 62. ut supra.

(o) *Chiles* v. *Sands*, 12 Mod. 52.

(p) *Partridge* v. *Naylor*, Cro. Eliz. 331.

another county, it was resolved, that the issue CHAP. XIII.
should be tried in the county where the taking was, and not where the driving is supposed; for there they cannot take conusance whether they were the same beasts that were taken in the other county. (q) It however seems to be one of those cases in which facts arising in two counties may constitute but one offence; and therefore the action may be brought in either. And even if brought in the wrong county, it would now be cured after verdict by stat. 16 & 17. Car. 2. c. 8. (r)

In another case on the statute of Philip & Mary, in which the plaintiff declared of a Distress taken in a hundred in one county, and driven six miles out of the county, without averring that it was more than three miles from the hundred in which the taking was. Even after verdict, the judgment seems to have been arrested, upon the ground of its not necessarily appearing to be an offence within the statute, because the hundred might have extended into both counties. (s)

This statute by inflicting a new and different penalty on an offence provided against by a former statute, namely the fourth chapter of the statute of Marlebridge, seems to be a virtual repeal of that part of the former act, and therefore that the re-

(q) Note (a) on F. N. B. 90. Scott v. Brest, 2 T. R. 241. *Mayor of London* v. *Cole*, 7 do. 583. and see *Bellasis* v. *Burbriche*, 1 Ld. Raym. 187.

(s) *Anonyma*, Godbolt, 41. This however would now be helped by the statute of Jeofails.

CHAP. XIII. medy to be pursued for it, must now be wholly founded on the latter statute. (t) For although in many cases, where a statute is only declaratory of the common law as to the description of the offence, the penalty imposed upon the offender by the statute is a cumulative remedy; yet where a statute creates an offence and inflicts a penalty, the remedy prescribed by it must be pursued: and in some cases it is so, even where the offence is not altogether created by the act. Thus upon the second chapter of the statute of Marlebridge, Lord Coke observes, that excepting the penalty thereby imposed, it is but a declaration of the common law, and yet that the only remedy now to be pursued is an action upon this statute. (u) So it seems to be with respect to the offence of driving or impounding of a Distress, contrary to the directions of the stat. 1 & 2 Ph. & M. c. 12. For in an action of trespass brought for taking cattle, in which the defendant pleaded damage-feasant, and an impounding within three miles, and the plaintiff replied, that the impounding was in another county, the court held it a departure, because the declaration was founded upon the common law, and the replication upon a statute; observing, that it being a statutory offence, the plaintiff ought to have brought his action upon the statute. (x) And in a later case, where on a justification for

(t) *Wooderoft* v. *Thompson*, 3 Lev. 48.

(u) 2 Inst. 104, 131.

(x) *Wooderoft* v. *Thompson*, 3 Lev. 48.

impounding cattle damage-feasant, it appeared that the impounding was in another county, the court held, that it did not make the distrainor a trespasser *ab initio*, although it subjected him to the penalties of the statute. (*y*) CHAP. XIII.

With respect to the costs of an action on this statute, it has been said by a learned writer, that the statute of Gloucester does not extend to cases, where double or treble damages are given by a subsequent statute, and consequently, that as the statute of Ph. & M. does not give costs as well as damages, no costs can be recovered under it. (*z*) And this appears to be the opinion of Lord Coke, (*a*) founded on a case reported by Lord Dyer; (*b*) but in a subsequent case it was otherwise determined with respect to the second section of the statute, upon this ground, that where a statute gives a penalty certain, and an action of debt for it, there the party suing is, *ex consequenti*, entitled to damages and costs for the detention of the debt; and that in this respect, the statute of 1 & 2 Ph. & M. c. 12. differs from the other statutes to which it has been compared, wherein the penalty given is uncertain. (*c*) And indeed, that in this point the second section of this statute, differs from

(*y*) *Gimbart* v. *Pelah*, Stra. 1272.

(*z*) Tidd's Pract. 3d edit. p. 865, 866. and see Hullock on Costs, p. 476.

(*a*) 2 Inst. 289.

(*b*) *Anonym.* Dyer, 177. b.

(*c*) *North* v. *Wingate*, Cro. Car. 560. 1 Roll. Abr. 574.

CHAP. XII. the first, which gives uncertain treble damages (*d*). As however the first section gives to the party grieved not only treble damages, but also a penalty certain of five pounds, there seems to be no substantial distinction between the two sections with respect to costs, and consequently, that if the reasoning adopted by the court in this latter case be just, costs are recoverable under either section of the statute.

Of an Excessive Distress.

Excessive Distresses were always illegal at the common law, but it was found necessary at a very early period to confirm the sanctions of the common law in this respect, by statutory provision. And accordingly by the statute *De Districtione Scaccarii*, 51 Hen. 3. stat. 4. it was enacted, "that "Distresses should be reasonable after the value "of the debt or demand, and by the estimation of "neighbours, and not by strangers, and not out-"rageous." This was followed by the statute of Marlebridge, the tenth chapter of which provides, "That Distresses shall be reasonable, and not too "great; and that he who taketh great and unrea-"sonable Distresses, shall be grievously amerced, "for the excess of such Distresses." Which provision was confirmed by the *Articuli super chartas* 28 Edw. 1. stat. 3. cap. 12.

The operation of the statute of Marlebridge is

(*d*) 1 Roll. Ab. 517.

general; for although it has been said that it does not extend to all kinds of Distress; for that no Distress for homage, fealty, or the expences of knights in parliament can be excessive, the better opinion seems clearly to be, that it applies to all cases of Distress whatsoever. (*e*) And its effects has therefore been to supersede the ancient common law, both as to this offence, and its remedy. So that in general, the only remedy to be pursued for it, is an action founded on the statute. Therefore no indictment or information will lie for an excessive Distress. (*f*) Nor can a general action of trespass be brought for it: (*g*) unless indeed the Distress appear upon the face of the record to be so very excessive, that the distrainor must be considered as a trespasser for taking it. As in distraining six ounces of gold and a hundred ounces of silver, for the sum of six shillings and eight pence; for here the excess was not only palpable, but specific. (*h*) So if an excessive Distress be abused, that is a separate cause of action; (*i*) or if to such a Distress, be added any other distinct trespass, as that of turning the plaintiff out of his house, for such additional act, an action of trespass will lie. (*k*)

(*e*) 2 Inst. 107.

(*f*) *Rex* v. *Ledgingham*, 1 Vent. 104. S. C. 1 Lev. 290.

(*g*) *Woodcroft* v. *Thompson*, 3 Lev. 48. *Lynne* v. *Moody*, Fitzgibb. 85. S. C. 2 Stra. 851. *Hutchins* v. *Chambers*, 1 Burr. 590.

(*h*) *More* v. *Munday*, cited 1 Burr. 590. and *Crowther* v. *Ramsbottom*, 7 T. R. 658.

(*i*) *Lynne* v. *Moody*, 2 Stra. 851.

(*k*) *Etherton* v. *Popplewell*, 1 East, Rep. 139.

CHAP. XIII. The Distress however, for the taking of which, an action even on the statute of Marlebridge may be brought, must be one obviously excessive. As if a man distrain two or three oxen for twelve pence, or if he distrain a horse or an ox for a small sum, where a sheep or a pig may be taken, this is an excessive Distress; because he might have taken a beast of less value. But if there be no other Distress on the land, then the taking of one entire thing, however great may be its value, is not unreasonable. (*l*) And therefore it has been said, that even for a small demand, a cart and horses may be distrained, because they are not severable from each other. (*m*)

In an action on this statute, it is necessary to shew upon the face of the record, that the Distress is excessive, for otherwise it does not sufficiently appear to the court, to be a case within the act. (*n*)

Lastly, "There can be no remedy upon the "statute of Marlebridge, where there is a remedy "at the common law, nor if the plaintiff has reco- "vered in replevin, can he afterwards bring an "action on that statute; for an action on that sta- "tute is founded on there being a cause of Dis- "tress, of which the recovery in replevin shews

(*l*) Gilb. Distr. 63.
(*m*) *Clarke* v. *Tucket*, 2 Ventr. 183. 1 Roll. Abr. 674.
(*n*) *Rex* v. *Ledgingham*, 1 Mod. 288. *Clarke* v. *Tucket*, ut supra.

"there was none; moreover in replevin, damages CHAP. XIII.
"were recoverable for the taking, and a man shall
"not be permitted to say, there was a cause of
"Distress after he has recovered upon the ground
"of its being unlawful." (*o*)

(*o*) Hunt's Gilbert, p. 68.

CHAPTER XIV.

Of Rescous and Pound Breach, and of the several Remedies for the same.

THE unlawful rescue of a Distress, or the breaking of a pound, was always an offence at common law, and the remedy for it was a special action of trespass; but a further remedy has been given in some cases, by the provision of a modern statute. It is not however every rescue of a thing distrained which is deemed unlawful; for, as I have already observed, there are various occasions on which the owner of the goods is entitled to make rescue of them, if wrongfully taken. And indeed it may be considered as a general rule, that wherever a Distress is wrongful in its inception, it may be rescued. In some cases also, rescue may be made of a Distress that has only become wrongful by matter subsequent; this however depends upon certain distinctions which it will be necessary to consider.

A rescue may be made of any Distress which is absolutely tortious, as if made for rent, whether it be a rent charge or rent service, where none is in arrear. (*a*) But it was held at the common law, that if the lord had once gained a seisin of rent, the tenant could not rescue a Distress made for it, upon the ground of his never having held by such rent; although where the tenant held by one rent, and the lord by encroachment gained seisin of a further rent, it was held that the tenant might tender what was really due, and rescue the Distress made for the rent by encroachment; (*b*) and therefore in general it was considered, that if any part of the rent distrained were in arrear, or if the tenant held by other services than those distrained for, he could not make rescue. (*c*) But as a Distress is only a means of compelling the payment of the rent, if at any time before the Distress, the tenant tender all the arrears, and the landlord afterwards distrain, the tenant may rescue it. (*d*) And as it should seem, may even rescue a Distress *before it is impounded*, if unlawfully *detained* after tender of the arrears of rent, and the charges of the Distress itself. (*e*) CHAP. XIV.

Wood. 366. 367. 3 Salk. 344.

A rescue may also be made of a distress for an unlawful amerciament, (*f*) or if the subject or

(*a*) Co. Litt. 160, 161.
(*b*) *Bevil's* Case, 4 Rep. 11. b.
(*c*) Bro. Abr. Rescous, pl. 14. 18.
(*d*) Co. Litt. 160, 161.
(*e*) *Six Carpenters'* Case, 8 Rep. 146. *Bevil's* Case, 4 Rep. 11. b. *Firth* v. *Purvis*, 5 T. R. 433.
(*f*) Com. Dig. Distr. B. 5 Bro. Abr. Rescous, pl. 12.

CHAP. XIV. place of the Distress be improper, as if beasts of the plough be taken, when another sufficient Distress may, at the same time, be had, or if any things be distrained, which is not distrainable at common law, or by statute, or if the Distress be taken in the highway. (g)

The rescue must however be made by the tenant or owner of the goods, and not by a stranger, for he can have no right to dispute the Distress. (h) And, therefore, if in one Distress the goods of two persons be wrongfully taken, it seems to be the better opinion, that each can make rescue only of his own goods, for indeed he is a stranger to the remainder of the Distress. (i) And therefore in such a rescue, severance must, if possible, be made. (k) Where a rescue however is lawful, it may be made, not only by the tenant or owner of the goods himself, but by an agent: and therefore may be made by his guardian, or even by a servant, who may afterwards justify under his command. (l)

A Distress made out of the lord's fee is unlawful, and therefore, if the lord distrain out of his fee, in lands not holden of him, the tenant may make rescue, unless it be in some special cases.

(g) Co. Litt. 161. a.
(h) 1 Roll. Abr. 673.
(i) F.N.B. 102 et notis.
(k) *Jennyngs* v. *Playstowe*, Cro. Jac. 568.
(l) Bro. Abr. Rescous, pl. 7. 12.

And if the lord come to distrain cattle which he sees within his fee, and the tenant, or any other person, in order to prevent the lord from distraining them, drive the cattle out of the fee, yet the lord may immediately follow and distrain them; and the tenant cannot make rescue, although they be taken out of the lord's fee. But if the lord coming to distrain, had no view of the cattle within his fee, although the tenant drive them off purposely, or if, after the view, the cattle of their own accord go out of the fee, or the tenant remove them, for any other cause than to prevent the distress, and the lord afterwards distrain them out of his fee, the tenant may make rescue. So if a man come to distrain for damage-feasant, and see the beasts in his soil, and the owner chase them out, though only for the purpose of preventing the Distress, he cannot distrain them, and if he do, the owner of the cattle may rescue them, for the beasts must be damage feasant at the time of making the Distress. (*m*)

It is a general rule that no rescue can be made of a Distress after the goods are impounded, for then they are in the custody of the law. If, however, the cattle of a commoner be wrongfully taken as damage-feasant, and impounded, and he make fresh pursuit after them, and find them in an open pound unlocked, it is said that he may retake them. (*n*)

(*m*) Co. Litt. 161. ibid.
(*n*) Co. Litt. 47. b. et not.

CHAP. XIV. There may be an unlawful rescous in law, as well as in deed, as if a man has taken a Distress, and the cattle distrained, as he is driving them to the pound, go into the stable or close of the owner, if he that took the Distress demand them of the owner, and he do not deliver them, this is a rescous in law. (o) But there is no rescous unless the distrainor have possession of the goods; as if a man come to distrain, and he be prevented from so doing, he shall not have a writ of rescous, but an action on the case. (p) For although such disturbance may amount to a disseisin of the rent or service, it is not a rescous until the thing be distrained. (q) And if the distrainor quit possession of the Distress, the retaking of the goods is not a rescue of them. (r)

Both rescous and pound-breach were, as I have before observed, offences at the ancient common law; and although the statute 2 W. & M. c. 5. has provided a further remedy for them in the case of a distress for rent, yet even in that particular kind of Distress, it has not superseded the remedies given by the ancient common law. It will therefore be proper to consider, in the first place, these common law remedies; and afterwards inquire into the effect of the statute of William & Mary.

(o) Co. Litt. 161. a.
(p) F.N.B. 102.
(q) Co. Litt. 160.
(r) *Dod* v. *Monger*, 6 Mod. 216.

The remedy at common law for an unlawful rescue, is a special action of trespass for taking and detaining the goods being distrained, and about to be impounded, in which may be included a count for an assault on the distrainor, or his bailiff. (*s*) And if there be a rescue of several Distresses for different rents, the whole may be included in one writ of rescous. (*t*)

As the person in whose right the Distress is made, is the party damnified by the rescue, he only can have this writ, and therefore if there be a rescue of a Distress which is taken by the lord's bailiff, the lord himself shall have the writ, and not the bailiff, and therein he may include, not only the assault and battery of his servant, but also the loss of his service: (*u*) as even a rescue and pound-breach may be included in one writ. (*x*) But if the king, by his bailiff, make a Distress for rent, and it be rescued, the bailiff shall have the writ, and not the king. (*y*)

The writ of rescous may state generally the Distress and the rescue, without even specifying the place where the rescue was made; but this must be shewn in the count, which must also set forth the times when the rent or services accrued, for which the

(*s*) F.N.B. 101.
(*t*) Hale, note, ibid. Bro. Rescous, pl. 1.
(*u*) *Alwayes* v. *Broome*, 2 Lutw. 1268.
(*x*) F.N.B. 101, 102.
(*y*) Ibid.

CHAP. XIV. Distress was made. (z) And it has been held, that even if the Distress be made out of the fee of the lord, upon fresh pursuit, the common form of the writ is sufficient. (a) And if the count shew when the writ was in arrear, it is not requisite to allodge a seisin of it. (b) Nor is it always necessary to be laid *vi et armis*, for it may be a rescous, though done without force. (c)

To this action, the defendant may plead the general issue, of not guilty, or he may plead special matter in bar. (d) And it should seem, that upon rescue of a Distress for rent in arrear, *riens in arrere*, is a good plea; (e) since it is clear, that upon a Distress for rent not due, the tenant may make rescue, without being driven to his replevin. And so is a plea of *non tenuit*, for in this action the tenure is traversable; and indeed, if denied, the negative must be specially pleaded, for it cannot be shewn under the general issue of not guilty. (f) But a plea of *ne unques seisie*, is not good; (g) for this would be to try the seisin of the rent, which cannot be allowed in this action. (h) Nor can the defendant plead, that he held by other services, for if he hold of the lord at all, he cannot

(z) Hale, note F. N. B. 101. Theol. Dig. lib. 10. cap. 9.
(a) Bro. Abr. Rescous, pl. 3.
(b) Bro. ibid. pl. 7.
(c) Bro. ibid. pl. 2
(d) Bro. Abr. Rescous, pl. 28.
(e) Ibid. pl. 6. S. V. Ibid. pl. 10, 16. and Estoppel, pl. 102.
(f) Bull, Ni. Pri. 62.
(g) Bro. Rescous, pl. 10.
(h) Bro. Abr. ibid. *Bull's* Case, 4 Rep. 11.

make rescue. (*i*) It seems rather doubtful, whether to this action, the general plea of *hors de son fee* be good; and it is therefore better to plead that the *locus in quo* was *hors de son fee*, and held of another lord; to which the plaintiff may reply, that the Distress was made for a rent-charge, or that the cattle were taken on fresh pursuit. (*k*) So that it is not sufficient for the defendant to traverse the place of the taking laid in the count, but he must go on, and shew it to be either his own or a stranger's freehold, in which the Distress ought not to have been made. (*l*)

The defence must be such as to cover the whole rescue; and therefore, where rescous was brought for rescuing forty sheep of the defendant, and eighty belonging to J. S. and the defendant justified the putting of his forty sheep into the *locus in quo*, to use his right of common therein: and that the plaintiff *de injuriâ suâ absque rationabili causâ*, took and chased them; and that he the defendant would have taken them from him, and they ran among the other eighty sheep of J. S. and flocked with them; and because he could not sever them, he took and chased them, *Quæ est eadem, &c.* Upon demurrer to the plea, it was, without argument, adjudged to be bad. For the defendant could not rescue the sheep of J. S. and

(*i*) Bro. Abr. ibid. pl. 18.

(*k*) Bro. Rescous, pl. 3, 19. (*l*) Bro. Abr. Rescous, pl. 22. Id. Issues joines, pl. 26. 9, 11.

CHAP. XIV. although it appears that they flocked together, and he could not sever them, yet he ought to have pleaded that he chased them to a certain place in order to sever them, and not that he chased them all away: (*m*) or, according to Dodderidge Justice, he might have justified putting them all back on the common, until they were severed; (*n*) or have shewn, that he afterwards severed them, and returned the sheep of J. S. to the plaintiff. (*o*) For if the defendant by his plea will justify the rescous, he must shew distinctly that it was lawfully made. And therefore, in another case, where the plaintiff declared for rescuing four hogs, and for breaking the pound, and taking out of it a fifth hog, all being distrained damage-feasant; and the defendant pleaded not guilty to the pound-breach; and as to the rescous, that whilst all the hogs were in the plaintiff's possession, he tendered amends, but without traversing that any one of the hogs was then impounded; the court held it bad; for although he had pleaded not guilty to the pound-breach, yet it might be, that he had retaken the fifth hog out of an open unlocked pound, and consequently without being guilty of the pound-breach; although the tender of amends, as to the rest, would be too late; and his stating them all to be in the plaintiff's possession when the tender was made, was too argumen-

(*m*) *Jennyngs* v. *Playstowe*, Cro. Jac. 568.
(*n*) S. C. 2 Roll. Rep. 163.
(*o*) S. C. Palmer, 123.

native, without distinctly denying that any one of them was before impounded. (*p*)

It is observed by a late learned writer, (*q*) "that this action is now rarely brought, but a special action on the case, in which non-tenure may be given in evidence on the general issue;" but by this must be understood, only the case of rescous of a Distress for rent; upon which an action lies on the statute of 2 W. & M. c. 5; for every other rescous remains as it was at the common law, and consequently must be pursued by an action of trespass, although, as I have before observed, it needs not necessarily be laid *vi et armis*.

Pound-Breach at Common Law.

Pound-breach was at the common law a greater offence than an unlawful rescue, being considered as a trespass to the king and a breach of the peace, for which even hue and cry might be raised against the offender. (*r*) And, as it is commonly said, might be inquired of in the sheriff's tourn, as an offence committed in direct contempt of the authority of the law. (*s*)

It has been already observed, that if the cattle of a commoner be taken as damage-feasant, and he upon fresh pursuit find them in a pound not locked or fastened, he may lawfully retake them. (*t*)

(*p*) *Alaways* v. *Broome*, 2 Lutw. 1262

(*q*) Bull. Ni. Pri. 62.

(*r*) Mirror, c. 2. s. 26.

(*s*) 2 Hawk. P. C. 67.

(*t*) Co. Litt. 47. b.

CHAP. XIV. But in general, as soon as the Distress is impounded in any lawful pound, it is so much in the custody of the law, that it cannot be retaken without the party's being guilty of a pound-breach (*u*). One exception however to this rule is mentioned; for it is said, that if there be lord, mesne and tenant, and the tenant be distrained by the lord for services not due from the mesne, the mesne (to relieve the tenant) may take the tenant's cattle out of the pound, and put his own in their stead. (*x*)

The remedy at common law for this injury to the distrainor, is by a special action of trespass founded on the writ *de Parco-fracto*: besides which, the distrainor may retake the goods, and again impound them. (*y*) In this writ, the breaking of the pound is said to be done *vi et armis*, but it is not necessary to shew in the writ, what kind of cattle or goods were distrained, nor whose property they are. (*z*) This rule however seems to be confined to a Distress for rent or service; for if it be made for an amerciament, the cause of the Distress should appear in the writ, as well as that the goods were the property of the person amerced; because for an amerciament, the goods of a stranger cannot be taken. (*a*) And if the Distress be made by the bailiff of the plaintiff, it seems to have been

(*u*) F. N. B. 100. S. V. *Alwayes v. Broome*, 2 Lutw. 1202.

(*x*) Co. Litt. 100. a. *Treasam's* Case, Rep. 110. b.

(*y*) Bro. Avowry, pl. 13. Co. Litt. 47. b.

(*z*) F. N. B. 100.

(*a*) Ibid.

usual so to state it in the writ. (*b*) But it is not necessary, either for the writ or the count, to make a title to the Distress, because the unlawfulness of the Distress is no excuse for a pound-breach. (*c*)

The writ *de parco-fracto* lies at the suit of the distrainor, but not at the suit of his bailiff who made the Distress, nor at the suit of the owner of the land in which the pound may be; for it is not his pound for the time being, but the pound of him who distrains. (*d*) And if the husband distrain for rent or services in right of his wife, and a stranger take them out of the pound, the husband shall have the writ in his own name, although it is said that the wife may be joined. (*e*)

It seems that a writ *de parco-fracto* will not lie against the owner of the pound. And therefore, where to an action for breaking the pound, and taking out the beasts, the defendant pleaded not guilty, as to the taking; and as to the pound-breach, said he was lord of the soil on which the pound stood, and that he broke the lock, and put on another lock of his own: it was said by Hobart Justice, that it was no pound-breach, unless the beasts came out; and by Jones Justice, that if the

(*b*) Ibid. Regist. Brev. 116.
(*c*) *Anonymous*, 1 And. 31. *Cottsworth* v. *Rattison*, 1 Salk. 247.
(*d*) F. N. B. 100.
(*e*) Ibid. but Fitzherbert adds *Tamen quære.*

CHAP. XIV. beasts did come out, a *parco fracto* would not lie, because the freehold was in the defendant, and that the proper remedy was a special action on the case. (*f*)

Of a Rescue or Pound-Breach on the stat. of Wm. & Mary.

In the case of a rescue, or pound-breach on a Distress for rent, a further remedy than that given by the common law has been provided by the statute 2 W. & M. c. 5. by the fourth section of which, it is enacted, "That upon any pound-breach "or rescous of goods or chattels distrained for "rent, the person or persons grieved thereby, "shall in a special action upon the case, for the "wrong thereby sustained, recover his and their "treble damages and costs of suit, against the "offender or offenders, in any such rescous or "pound-breach, any or either of them, or against "the owners of the goods distrained, in case the "same be afterwards found to have come to his "use or possession."

In an action on this statute, it is necessary to make a title to the Distress, by setting forth the demise upon which the rent accrued, and shewing that the rent was due. (*g*) And in general to shew, that the Distress is warranted by the act: (*h*) but it is not necessary to alledge or prove that the notice required previously to the sale of the Dis-

(*f*) *Holman* v. *Tuke*, Winch's Rep. 80. 215. *Bellasis* v. *Burbridge*, 1 Lutw. 214.
(*g*) *Dod* v. *Monger*, 6 Mod. (*h*) Ibid.

tress was given, because such notice cannot be required as against wrong doers. (*i*) CHAP. XIV.

The venue should be laid where the rescous is committed, for that is the gist of the action, and the rest but inducement: and therefore, where the demise, rent and Distress were stated to be in three vills, but the venue laid in that only where the rescous was committed, the court held it to be good. (*k*)

If a Distress be impounded on a part of the premises demised, according to the directions of the stat. 11 Geo. 2. c. 19. s. 8, 9, 10. any retaking of the goods is a pound-breach within the stat. 2 W. & M. c. 5. although it might not have amounted to a pound-breach at the common law. (*l*) And tender of amends after impounding, is no plea to an action on the latter statute. (*m*)

In this action the plaintiff is entitled not only to treble damages, but treble costs may also be recovered. (*n*)

(*i*) Ibid.
(*k*) Ibid. and S. C. Ld. Raym. 170.
(*l*) *Firth* v. *Purvis*, 5 T. R. 432.
(*m*) Ibid.
(*n*) *Lawson* v. *Story*, Carth. 321. S. C. Ld. Raym. 19.

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ADDENDA.

P. 25. At the end of note (*m*) add, And by a modern statute 5 Geo. 3. c. 17. rent may be reserved on certain leases of tythes, and an action of debt brought for its recovery.

P. 240. line 7. Add, If however cattle distrained escape from the pound, *without the default* of the distrainor, it seems that he may make another Distress; or maintain trespass against those, who, after a demand, wrongfully detain the beasts which have escaped. *Vaspor* v. *Eddowes*, 1 Salk. 248.

FINIS.

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